(18,344.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 491.

THE CITY OF NEW YORK AND BIRD S. COLER, AS COMPTROLLER THEREOF, PETITIONERS,

vs.

SAMUEL PINE AND FREDERICK MÜLLER.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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To the Honorable, the Judges of the Circuit Court of the United States of America, for the Southern District of New York. 1

Your orators, Samuel Pine and Frederick Muller, bring this, their bill of complaint, against the Mayor, Aldermen and Commonalty of the City of New York, and thereupon your orators aver:

First—Your orators are citizens of and residents in the State of Connecticut and owners in fee of land in said State, situated on the Byram river, or on the West Branch thereof, and the defendant, the Mayor, Aldermen and Commonalty of the City of New York, is a 2 municipal corporation organized and existing under the laws of the State of New York.

Second—The West Branch of the Byram river has its source in Westchester County, in the State of New York, and flows in a generally southerly course through Westchester County, in New York State, for about five miles, and then flows into and through the State of Connecticut, forming with the Middle and East Branches thereof, the Byram river, which said Byram river, with the exception of a part of the Westerly Branch, as above stated, flows continuously 3 and only through the State of Connecticut until it reaches tide water.

Third—The said river and its said branches are non-navigable until said river reaches tide water. Said river then becomes navigable, and then becomes the boundary between the States of Connecticut and New York.

Fourth—Your orators further aver that the defendant began about two years ago the building of a dam across the said West Branch of said Byram river

about five hundred feet north of the Connecticut line, and is now building said dam and it is now near completion, and your orators are informed and believe that the said defendant intends to divert or cause to be diverted the water of said West Branch or some of it from the natural channel thereof, and intends to divert or cause the same to be diverted from flowing through its natural channel into and through the State of Connecticut, and by, through and over land owned by your orators. That the Westerly Branch of said Byram river is the branch from which the largest supply of water for said river is received, and that the diversion of the water of said branch or any of it would cause great injury and damage to your orators and each of them.

Fifth—Your orators further aver that they as riparian owners of land in the State of Connecticut, on said Byram river or on the West Branch thereof, are each of them accustomed to use the water of said river or of the West Branch thereof, and that the said river or its West Branch flows through or by land belonging to your orators in the State of Connecticut, and that valuable mill sites and other valuable rights and privileges are owned by your orators on said Byram river or on the West Branch thereof; and that your orators live upon land fronting upon said river, and that the homes of your orators are in close proximity thereto, and that the health of your orators would be directly affected by lessening the flow of the water in said river, and that the flow of said river would be materially lessened by the diversion of the water of the said West Branch, or any part thereof, and that they, your orators, and each of them, would be damaged in the sum of twenty-four hundred dollars ($2,400) and more.

Sixth—Your orators further aver that as they are advised and believe, the defendant herein ought not to continue the building of said dam, and ought not to maintain or continue the same, and ought not to divert

the water of said river or of said West Branch thereof.

7

Seventh—Your orators further show that they are advised and believe that the defendant may not lawfully divert the water of said West Branch of the Byram river, or any thereof.

Wherefore, your orators bring this bill of complaint in equity and seek the intervention of this Court, as is necessary for your orators to do in order that they may be protected in their rights in the premises, and your orators pray your Honors to enjoin and restrain the defendant, its officers, agents, attorneys and employees and all other persons from continuing to build said dam or any part thereof across the said West Branch of the said Byram river, and from maintaining or continuing to maintain the same and from diverting the water of said West Branch or any part thereof, or to prevent in any way the water of said West Branch or any part thereof from flowing through its natural channel at any time, and to grant your orators such other and further relief as to your Honors may in the premises seem meet.

8

May it please your Honors to grant unto your orators a writ of subpœna to be directed to the said Mayor, Aldermen and Commonalty of the City of New York, thereby commanding it at a certain time and under a certain penalty therein to be limited, to personally appear before your Honors in this Honorable Court and then and there, full, true, direct and perfect answer make to all and singular the premises and further to stand to, perform and abide by such further order, direction and decree therein as to your Honors shall seem meet.

9

Your orators will ever pray, etc.

SAMUEL PINE,
FREDERICK MULLER.

MORAN & WILLIAMS,
Complainants' Solicitors.

STEPHEN G. WILLIAMS,
Of Counsel.

10 SOUTHERN DISTRICT OF NEW YORK, } ss.:
County of Westchester. }

Samuel Pine and Frederick Muller, being severally duly sworn, each for himself says: That he is one of the complainants in the foregoing bill of complaint; that he has read the said bill and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on his information and belief and as to such matters he believes it to be true.

SAMUEL PINE.
FREDERICK MULLER.

Sworn to before me this 24th }
11 day of March, 1896. }

JOHN LEONARD,
Notary Public,
in and for Westchester Co., N. Y.

12

CIRCUIT COURT OF THE UNITED STATES 13

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendant.

In Equity. 14

The answer of the above-named defendant to the bill of complaint of the above-named complainants.

In answer to the said bill of complaint the Mayor, Aldermen and Commonalty of the City of New York says as follows:

First—It is a municipal corporation organized and existing under the laws of the State of New York, but it has no knowledge or information sufficient to form a belief whether the complainants are citizens of and residents of the State of Connecticut or owners in fee of land in said State on the Byram river or on the West Branch thereof. 15

Second—It admits the allegations in the paragraphs of the bill of complaint marked second and third.

Third—Many years ago it took proceedings to acquire title to large quantities of lands in the County of Westchester to be used in connection with the supply of water to the City of New York, and it pro-

16 ceeded to construct, and is still constructing, numerous dams, aqueducts, reservoirs and other structures necessary for the said supply of water, and has expended upward of thirty millions of dollars in providing for said water supply for the residents of the City of New York. It admits that, among other things, it is building a dam across the West Branch of the Byram river, in the State of New York, and a short distance from the boundary line between that State and the State of Connecticut, but it avers that the said dam is not completed, nor near completion, and will not prevent the natural flow of the said West Branch of the Byram river for at least one year. It admits that it intends to divert some or all of the water of said West
17 Branch from its natural channel, but whether the flow of the said river in its natural channel is by, through or over lands owned by the complainants in the State of Connecticut it has no knowledge or information sufficient to form a belief, and it alleges that the diversion of water of the said branch would cause but little, if any, injury and damage to the complainants or either of them.

Fourth—It has no knowledge or information sufficient to form a belief as to the truth of the allegations in the paragraph of the complaint marked fifth, and it alleges that the mill sites, referred to in the bill of complaint, even if owned by the complain-
18 ants, are of little if any value, and that the lessening of the flow of water by diverting the whole or a part of the West Branch of said river, would be of little or no injury to persons living along the shore of the said Byram river. It denies, on information and belief, that the premises mentioned in the complaint would be damaged in the sum of $2,400 and more in each case.

Fifth—It states, as to the sixth and seventh paragraphs of the bill of complaint herein, that the building of the said dam is, or will be of great and

permanent public benefit to the City of New York and its residents, and to all of the persons dwelling therein, and it avers that it is and always has been amply able and willing to pay any damages that the complainants may suffer from being deprived of the water that naturally comes from the said West Branch of the Byram river.

Wherefore, it prays that the bill of complaint herein be dismissed, with costs.

FRANCIS M. SCOTT,
Counsel to the Corporation.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendants.

City and County of New York, *ss.*:

Richard A. Storrs, the Deputy Comptroller of the City of New York, and an officer of the defendants in the above-entitled action, being sworn, says: That the foregoing answer is true to his knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. Deponent further says, that the reason why the verification is not made by the defend-

22 ants is that they are a corporation; that this deponent is an officer of the same, to wit, Deputy Comptroller, and that the grounds of his belief as to all matters not therein stated upon his knowledge are as follows, to wit: Information obtained from the books and records of the Department of Finance, or of other departments of the City government, or from statements made to him by certain officers or agents of the defendant.

RICH. A. STORRS,
Deputy Comptroller.

Sworn to before me this 24th day of April, 1896.

G. L. STERLING,
23 [SEAL.] Notary Public,
New York County.

CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER

against

24 THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

Replication of Samuel Pine and Frederick Muller, the complainants, to the answer of the Mayor, Aldermen and Commonalty of the City of New York, defendants.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold

insufficiencies of the said answer, for replication there- 25
unto saith, that he will aver and prove his said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matter and things this repliant is and will be ready to aver and prove, as this Honorable Court shall direct, and humbly prays, as in and by his said bill he hath already prayed.

MORAN & WILLIAMS,
Solicitors for Complainants. 26

27

28 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

29 PROOFS FOR FINAL HEARING, taken on the part of the plaintiffs before James A. Renwick, one of the standing Examiners of the U. S. Circuit Court for the Southern District of New York, in the Second Circuit, pursuant to the 67th Rule of the Supreme Court of the United States, in Equity, as amended.

NEW YORK, October 4, 1897, 2 o'clock P. M.

Parties met pursuant to notice, dated the 20th day of July, 1897, and admission of service of same of even date.

30 Appearances—STEPHEN G. WILLIAMS, Esq., for plaintiffs.

By agreement with Mr. H. T. Dykman, counsel for the respondent, the examination of the plaintiffs by Mr. Williams will be taken subject to all objections and exceptions to be made hereafter by Mr. Dykman, and the right to cross-examine on behalf of the respondent is reserved.

SAMUEL PINE, a witness produced on the part of the plaintiffs, having been by me first duly sworn in the above-entitled action to testify to the truth, the whole truth and nothing but the truth, in answer to inquiries propounded by plaintiffs' counsel, deposes and says as follows : 31

1 *Q.* What is your name? *A.* Samuel Pine.

2 *Q.* Are you one of the complainants in the action brought by one Samuel Pine and Frederick Muller against the City of New York? *A.* I am the person.

3 *Q.* Are you a citizen of the United States? *A.* I am.

4 *Q.* And of the State of Connecticut? *A.* Of the State of Connecticut.

32

5 *Q.* How long have you been a citizen of the State of Connecticut? *A.* Since 1872, as near as I can remember.

6 *Q.* Are you the owner of real property in the State of Connecticut? *A.* I am.

7 *Q.* What is this paper I hand you? *A.* A deed from my father.

8 *Q.* To you? *A.* To me.

Plaintiffs' counsel offers in evidence deed from James Pine to Samuel Pine, and the same is marked "Plffs.' Exhibit, Pine Deed, Oct. 4, 1897, J. A. R., Examiner."

9 *Q.* Where is the land described in this deed situated? *A.* Town of Greenwich, on the Byram river. 33

10 *Q.* Does the Byram river run through your land or does it bound it on one side? *A.* It bounds it on the east side.

11 *Q.* About how many feet have you along that river? *A.* By the City survey, about 3,725 feet.

12 *Q.* What is your boundary on the east side? *A.* The middle of the Byram river.

13 *Q.* For how many years have you been the owner in fee of this property free from any life estate? *A.* From the time of my father's death.

34 14 *Q.* About when was that? *A.* I came in full possession of it at the time of my father's death.

15 *Q.* When was your father's death? *A.* I think about 1890.

16 *Q.* What value do you place upon your property there? *A.* $50,000.

17 *Q.* Now, can you give some reasons for placing that value upon it? *A.* Manufacturing feldspar.

18 *Q.* Is there a deposit of that on your property? *A.* We believe to be, yes; we are working it.

19 *Q.* You know there is a deposit of feldspar there? *A.* Yes; a very heavy deposit of feldspar.

20 *Q.* Do you make any use of the water of the Byram river? *A.* Yes; all general farm use, house
35 use and mill use for steam.

FREDERICK MULLER, a witness produced on the part of the plaintiffs, having been by me first duly sworn in the above-entitled action to testify to the truth, the whole truth and nothing but the truth, in answer to inquiries propounded by plaintiffs' counsel, deposes and says as follows:

1 *Q.* What is your name? *A.* Frederick Muller.

2 *Q.* Are you one of the complainants in this action of Pine and Muller against the City of New York? *A.* Yes, sir.

3 *Q.* Are you a citizen of the United States? *A.* Yes, sir.

36 4 *Q.* And are you also a citizen of the State of Connecticut? *A.* Yes, sir.

5 *Q.* How long have you been a citizen of the State of Connecticut? *A.* Since 1891.

6 *Q.* Are you the owner of real estate in the State of Connecticut? *A.* Yes, sir.

7 *Q.* What is this paper (handing witness paper)? *A.* That is my deed, sir.

8 *Q.* To property in the State of Connecticut? *A.* Yes, sir.

Plaintiffs' counsel offers in evidence deed from Andrew Burns and another to Frederick Muller, and the

same is marked "Plffs.' Exhibit, Muller Deed, Oct. 4, 1897, J. A. R., Examiner." 37

9 *Q.* Where is this property situated? *A.* In Connecticut.

10 *Q.* Whereabouts in Connecticut? *A.* On the Byram river, in the Town of Greenwich.

11 *Q.* Through what part of your property does the Byram river flow? *A.* Runs right through my place.

12 *Q.* So you own land on both sides of it? *A.* Yes, sir.

13 *Q.* And about how many feet frontage have you on the river, counting both sides, altogether? *A.* 2,290 feet.

14 *Q.* Have you improved your place in any way since you bought it? *A.* Yes, sir. 38

15 *Q.* In what way? *A.* Well, I have improved my buildings; some of them were going to pieces a little bit, and I improved them, and I improved the land; the land was wild.

16 *Q.* What do you consider your property now worth? *A.* Well, I ain't got no idea because I don't care about selling it.

17 *Q.* Without regard to your idea to sell it, what do you think is about the value? *A.* About $8,000.

18 *Q.* Do you make any use of the water of the Byram river? *A.* Yes.

19 *Q.* What uses do you make of it? *A.* Well, my cattle goes there regularly every day and waters; helps my wells along. 39

20 *Q.* General farm use? *A.* General farm use.

Further hearing adjourned to Tuesday, October 19, 1897, at 2 P. M.

Pages 7 to 13, inclusive, being deposition of George W. Birdsall, signed and filed in United States Circuit Court of Appeals on motion.

NEW YORK, November 8, 1897. 1a

PINE
against
THE MAYOR.

Met pursuant to adjournment.

Present—The EXAMINER; Mr. STEPHEN G. WILLIAMS, for plaintiffs; Mr. HENRY T. DYKMAN, for defendants. 2a

GEORGE W. BIRDSALL, a witness produced on the part of the plaintiffs, having been first duly sworn by said Examiner to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct examination:

By Mr. WILLIAMS:

Q. What is your name, age and occupation? *A.* George W. Birdsall; civil and mechanical engineer; age, sixty-one years. 3a

Q. In what way do you practice your profession as mechanical and civil engineer? *A.* At present I am Chief Engineer of the Croton Aqueduct for the City of New York, in charge of one of the bureaus of the Departments of Public Works, having charge and control of the water supply of the City of New York.

Q. How many years have you held this position? *A.* As Chief Engineer since 1884; as Assistant Engineer since January 1, 1872.

4a Q. Are you from your position acquainted thoroughly with the various sources of the water supply of the City of New York? A. I am; the present City of New York, because we are now commencing to spread ourselves a little.

Q. Are you acquainted with the proposed supply to be derived from a branch of the Byram river?

Objected to.

Mr. DYKMAN—There is no such thing as a proposed supply from the Byram river. The supply is here, or is fixed by resolution of the proper authorities.

Question withdrawn.

5a Plaintiffs' counsel offers in evidence chapter 445 of the Laws of 1887 of the State of New York as amended to date.

Q. Are you acquainted with the Byram river, Mr. Birdsall? A. I am.

Q. Will you give me a description of it as to where it rises and its branches?

Mr. DYKMAN—What part of the Byram river; in which State?

Mr. WILLIAMS—That is what I want Mr. Birdsall to say.

6a A. It rises in Westchester County, the State of New York, one branch in the Byram Pond and its tributaries, the other at Wampus Pond and its tributaries; these two branches come together near the Connecticut State line, in the State of New York; the other branch of the Byram river rises in the State of Connecticut, and with its several branches joins the other branch of the river about one mile north of Glenville, State of Connecticut; these two form the Byram river, which then flows south and west through the State of Connecticut until it reaches about one mile north of Portchester, from which place it flows to the Sound

and forms the dividing line between the State of New York and State of Connecticut. 7a

Q. Can you tell me what is the area of the watershed of that part of Byram river which lies in Westchester County, New York State? *A.* Yes.

Q. What is it? *A.* North of the junction of the Wampus and Byram Ponds the area is seven and sixty-six one hundredths ($7_{\frac{66}{100}}$) square miles; between that and one of the division lines between Connecticut and New York, which is about three-quarters of a mile south of that, there is a further area of about one square mile, making to one of the boundary lines of the State of Connecticut, eight and sixty-six one hundredths ($8_{\frac{66}{100}}$) square miles; between a point just north of Portchester and the Sound, the area of the watershed of the Byram river—— 8a

Mr. DYKMAN—Only in the State of New York.

Mr. WILLIAMS—Perhaps I better say Westchester County.

The WITNESS—That is in Westchester County also. Portchester is in Westchester County.

A. There is an area of three-quarters of a square mile.

Q. What is the area of the watershed of the other branches of the Byram river which you stated flowed into the Byram river about a mile above Glenville? 9a

Mr. DYKMAN—Objected to, because it is not limited to Westchester County and on the further grounds that it is incompetent, improper and immaterial.

Q. Mr. Birdsall, at what distance from the Connecticut State line has the City of New York erected a dam across the Byram river in Westchester County? *A.* About 700 feet.

Q. Does the eight and sixty-six one-hundredths miles of watershed north of the Connecticut line include the area south of that dam? *A.* It does.

10a Q. What is the area of the watershed north of that dam in Westchester County? A. Seven and sixty-six one-hundredths square miles.

Q. What is the average rainfall on the area of the watershed north of this dam?

Mr. DYKMAN—Objected to unless it is shown that the witness has kept some gauge or has some knowledge on the subject, and on the ground that it is too remote, the area not being specified, and on the further ground that it is a matter of common knowledge that the rainfall over various areas differs materially.

Q. Mr. Birdsall, do you know what the average rainfall on the area of the watershed of the Byram river in
11a Westchester County north of the dam is for the last ten years? A. I do not.

Q. Do you know what the rainfall has been in any one of the last ten years on that area? A. I do not.

Q. Do you know what the average flow of the Byram river at that point has been?

Mr. DYKMAN—Objected to unless the point is specified.

Mr. WILLIAMS—At that point where the dam is.

Mr. DYKMAN—What dam? At the point where the City is building the dam?

Mr. WILLIAMS—Yes.

12a A. I do not.

Q. Do you know what the flow of water has been at that point at any time during the last ten years? A. I do.

Q. Are you able to give me the flow there at any particular time? A. Not at present, I am not.

Q. Will you at the next meeting bring with you a memorandum? A. I will, if necessary.

Mr. DYKMAN—I suggest you give him some memorandum of time.

The EXAMINER—He says any time; he has his option.

Q. Mr. Birdsall, are you acquainted with the property of the complainants on the Byram river? *A.* To a certain extent. 13a

Q. Do you know the frontage on the Byram river that the two complainants have? *A.* Yes.

Q. What is the frontage of Mr. Samuel Pine on the river, and on which side of the river is it? *A.* Does Mr. Pine now own the property that used to belong to James Wilson?

Q. Yes, that is it? *A.* The property of Samuel Pine is situated on the west side of the Byram river, in the State of Connecticut and runs along the same, taking the windings of the stream for 3,725 feet.

Q. What is the fall in the stream from the upper part to the lower part of Mr. Pine's land? *A.* Twenty-six feet and seven-tenths. 14a

Q. Will you explain how you get at that fall of twenty-six feet and seven-tenths? *A.* From the level of the bottom of the river at Mr. Pine's southern boundary to the level of the bottom of the river at Mr. Pine's northern boundary along said stream.

Q. Now, are you acquainted with the land of Mr. Frederick Muller on the Byram river? *A.* Yes, sir.

Q. Will you tell me how it is situated on the Byram river?

Mr. DYKMAN—Objected to, that it has no relation to the action in question, and on the further ground that it appears from the statement of the witness that Mr. Muller's lands do not form any part of and have no relation to the action in question, the Pine case. 15a

Mr. WILLIAMS—This action was brought by Samuel Pine and Frederick Muller against the City of New York; that an answer was filed by the City; that an argument for a preliminary injunction has been made, and an appeal was taken from the order made thereon, and no objection has been made to the joining together of the two plaintiffs before this, and furthermore, that

16a the witness has made no such statement whatever in regard to Mr. Muller's lands having nothing to do with this case.

The EXAMINER—Answer the question, Mr. Birdsall.

Mr. Dykman excepts.

A. The property of Frederick Muller is situated on the Byram river, about three-quarters of a mile north of the north line of Mr. Pine's; his property extends on both sides of the river for 920 feet; on the west side of the river for 450 feet further north.

Q. Does the other branch of the Byram river which rises in Connecticut join the Byram river at or near Mr. Muller's lands?

17a

Mr. DYKMAN—Same objection, and as incompetent, improper and immaterial.

Further examination adjourned by consent until Monday, November 15, 1897, at 3 P. M.

(Sgd.) GEORGE W. BIRDSALL.

Subscribed to before me this 10th day of November, 1897.

JAMES A. RENWICK,
U. S. Examiner.

18a

40

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and another

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

NEW YORK, November 15, 1897. 41

Hearing adjourned, at Mr. Dykman's request, until Tuesday, November 16, 1897, at 2.30 P. M.

NEW YORK, November 16, 1897.

Parties met pursuant to adjournment.

Present—The EXAMINER; Mr. WILLIAMS, for plaintiffs; Mr. DYKMAN (by representative), for respondents. 42

GEORGE W. BIRDSALL, direct-examination resumed:

By Mr. WILLIAMS:

Q. Have you brought with you the memoranda which I requested you to bring in relation to the flow of the Byram river? *A.* I herewith present a statement of the flow of the water over the weir on the Byram river at the Tunnel Reservoir, which is situated just above

the dam now constructed in the State of New York, which is from July 1, 1895, to December 5, 1895. The rainfall placed upon this statement is the rainfall at Kensico Dam, situated about six miles in a straight line from where the weir was placed (hands paper to plaintiff's counsel). 43

Plaintiffs' counsel offers the statement in evidence.

Marked "Plffs.' Exhibit Byram River Weir Overflow, Nov. 16/97."

Q. Have you made calculations from time to time in past years in regard to the quantity of water to be received from the various sources of water supply of New York City? *A.* I have. 44

Q. Have you ever made any estimate of the supply which you expected the City to derive from this dam across the Byram river?

Objected to by defendants' counsel unless it refers specifically to the property that is included in these proceedings.

A. I have.

Q. Will you tell me what your estimate is of the total supply which could be received in a year?

Same objection by defendants' counsel.

A. Not of the total quantity in a year; that is a mere matter of figures; I will generally state that from rivers in this neighborhood we can obtain an average of one million gallons per day per square mile of drainage area. 45

Q. Then would it be a reasonable assumption that you could obtain from this drainage area of 7.66 square miles an average of 7,660,000 gallons per day? *A.* With proper storage, yes.

Q. And with a sufficiently large outlet it could be stored elsewhere? *A.* Certainly.

Q. Are you acquainted with the watershed of that branch of the Byram river which flows into the

46 Byram river about three-quarters of a mile north of Glenville?

Objected to by defendants' counsel on the ground that this is a water supply in the State of Connecticut.

A. Only superficially.

Q. Well, will you give me as near as you can the watershed of that branch, or those branches, giving perhaps the largest and the smallest size that can be in your belief?

Same objection by defendants' counsel.

A. From what I have seen of the watershed and from the contour maps that I have seen, it ranges from
47 seven to twelve square miles.

Q. By that do you mean that the watershed in your opinion is not over twelve miles and not less than seven miles?

DEFENDANTS' COUNSEL—What watershed?

PLAINTIFFS' COUNSEL—The same watershed.

Same objection by defendants' counsel.

A. It is of what is generally denominated the East Branch of the Byram river, as near as my present knowledge gives me data as to same.

Q. Assuming that your estimate of the watershed is correct, what would you expect to be the flow of the water of the East Branch of the Byram river at the
48 point where it joins the Byram river?

Same objection by defendants' counsel.

A. It would come within the general terms which I stated in my former answer of one million gallons per square mile of drainage area per day.

Q. In this statement which you have submitted to-day, which shows the flow of water over weir on Byram river at Tunnel Reservoir, there is a column headed rainfall, and under it at various points the number of inches that fell on that day; did I under-

stand you that this rainfall was taken at a point six 49
miles from that spot? *A.* It was.

Q. Does this statement show the total flow of water at the point where the dam is? *A.* It does; there was about two hundred feet, I should think, between one and the other; we were constructing a new dam at the time, and this was a dam formed in order to move this waste weir and carry the water around the present new construction.

Q. Well, does not this statement show a materially less flow than 7,660,000 gallons a day? *A.* It does for that time.

Q. Would the same statement for the rest of the year, in your opinion, bring up the average so as to conform with your estimate of the average flow? *A.* 50
Very closely.

Q. Have you any such statement? *A.* I have not.

Q. Will you give me some information in regard to your reasons for believing that the flow during the remainder of the year would be larger than as stated in the statement? *A.* Generally the largest flow of a stream is during the months of January, February and March, when the ground is frozen and any rainfall or melting of snows goes directly off the surface into the stream and is not absorbed by the ground surrounding the same.

Q. Comparing the East Branch of the Byram river and the Byram river which rises in Westchester County, which would have the greater flow at their 51
point of junction?

Objected to by defendants' counsel on the ground that defendants are only to use this particular stream and not any other, and as incompetent and irrelevant

A. The main Byram river would have a larger flow than the East Branch.

Q. Will you give me as near as you can the difference?

Same objection by defendants' counsel.

52 *A.* I should say that the flow of the main branch would be about eight-twelfths the flow of the main stream, at the junction of the two streams.

Q. Will you explain your reasons for stating this, in view of the fact that you stated that you believed the watershed of the East Branch to be about equal to or perhaps one and three-quarters the size of the Byram river watershed north of the dam? *A.* Because there is a comparatively large watershed between the dam and the junction of the two streams, which would add fifty per cent. to the drainage area of the main stream and add nothing to my testimony as to the drainage area of the East Branch.

Q. Then the drainage area of the Byram river,
53 proper, north of the junction of the East Branch of the river to the dam, would be about three and three-quarter miles? *A.* Yes; that or nearly four square miles.

Q. Nearly four square miles; if the City of New York diverted all of the water which flowed into the reservoir formed by the dam which has been referred to, by how much would the flow of the Byram river be reduced at the point of junction of the East Branch with the Byram river, by which I mean before the East Branch has joined it and also after the East Branch has joined the river?

Objected to by defendants' counsel as incompetent and irrelevant, as no question of diverting the stream
54 is in this suit.

A. From my general knowledge of the run of streams, I would say that the amount would be decreased on the stream above the junction about one-half; below the junction, about one-fifth—no; I take that back; I will say one-quarter.

Q. On the last examination you testified that you were acquainted with the property of Mr. Pine, one of the complainants in this action, and that the fall in the stream from the upper part to the lower part of Mr. Pine's land was 26.7 feet; is there any water right on

that river that you know of which would preclude Mr. 55
Pine, in conjunction with his opposite neighbors, from erecting a dam 26.7 feet in height? *A.* There is.

Q. Where is that situated? *A.* Near the lower end of this property (referring to map); just below the lower end of his property, on the property of S. Reynolds and W. H. Craft.

Q. Do you know at what point Mr. Pine could erect a dam without encroaching upon that water right? *A.* I do not.

Q. Do you know whether the City has purchased that water right or the right to divert the stream in so far as that particular water right is concerned? *A.* It has paid all the damages for the diversion of the stream above the Connecticut State line to this water right. 56

Q. Have you ever measured or do you know the fall of the land between the little bridge which crosses the river from the road into Mr. Pine's place and the foot of his place? *A.* I have not.

Q. Are you acquainted with the value in money of water rights? *A.* I am not, except in exceptional instances, where I have had a chance to study them up.

Q. Are you acquainted with the values of water rights on the Bronx river prior to the diversion of that stream by the City? *A.* I say, only in exceptional instances.

Q. Are you acquainted with the values of water rights on the Byram river? *A.* I am not.

Q. Are you acquainted in a general way with the 57
prices paid by the City of New York for various water rights acquired on the Bronx river?

Objected to by defendants' counsel on the ground that it is not in this action, and on the further ground it is incompetent evidence.

A. I will answer the question by saying, I am not.

Q. Have you not been in the habit of making esti-

58 mates of the value of the water to be diverted? *A.* I have not.

Q. Have you made any estimates of the value of the water to be diverted from the various property-owners on the Byram river? *A.* I have not.

Q. How would you base a valuation of the water to be diverted in regard to the property of Mr. Pine or Mr. Muller, the complainants?

Objected to by defendants' counsel as to Mr. Muller's property, on the same ground that the testimony as to Mr. Muller's claim at the last session was objected to by Mr. Dykman.

A. I would have to make a detailed examination of
59 the ground, the possibility or probability of improving the same by establishing a power, and also with regard to what the lands and so forth of Mr. Pine were used for.

Q. Having made this examination and basing your report as to the value on it, would you regard your report as giving a definite, certain, fixed value which could be relied upon? *A.* No; it would be only my individual opinion; that is all.

Q. And would it be an opinion which would be subject to change by the changed conditions of the property of the riparian owner? *A.* Certainly.

Q. And your report made on your examination of to-day might vary materially if made a year from now? *A.* It might.

60 *Q.* What effect would the increased population of the valley of the Byram river south of the dam and the increased cultivation of the fields and the building of more houses have upon the flow of water in the stream?

Objected to by defendants' counsel on the ground it is too remote.

A. As regards the flow of water, it would not sensibly change that at all, and in regard to the quality of water, no doubt it would deteriorate same, and it might be eventually the same as it was on

the Bronx, that although the City of New York paid 61
water damages, and so forth, to mill owners along the Bronx, they have all been wiped out under the State Board of Health laws and paid nothing; a large amount of water power that we paid for along the Bronx has been entirely extinguished under the laws of the State Board of Health, for which they paid the property owners nothing.

Subscribed and sworn to before me this day of November, 1897.

Further hearing adjourned by consent to Tuesday, 62
November 30, 1897, at 2.30 P. M.

NOVEMBER 23, 1897.

Further hearing adjourned to Friday, December 3, 1897, at 2.30 P. M.

DECEMBER 3, 1897.

Further hearing adjourned to Thursday, December 63
9, 1897, at 3 P. M.

DECEMBER 9, 1897.

Further hearing adjurned to Wednesday, December 15, 1897, at 3 P. M.

64 DECEMBER 15, 1897.

Met pursuant to adjournment.

Present—The Commissioner and Mr. DYKMAN (by representative).

At request of Mr. Williams the hearing was adjourned until Wednesday, December 22, at 3 P. M.

DECEMBER 22, 1897.

Hearing adjourned to Wednesday, January 5, 1898,
65 at 3 P. M.

JANUARY 5, 1898.

Hearing adjourned without date.

66

UNITED STATES CIRCUIT COURT, 67

SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

NEW YORK, March 24, 1899. 68

Parties met pursuant to notice.

Present—The EXAMINER; Mr. WILLIAMS, for plaintiffs; Mr. DYKMAN, for respondents.

It is stipulated, in so far as the form of evidence is concerned, that no objection will be made to it on the ground that the papers offered to-day are not the original papers.

Mr. WILLIAMS—I offer in evidence the minutes of the conference in the matter of claims by owners of property on the Byram river in the State of Connecticut for damages alleged to have been sustained by the 69
diversion of the waters of said river for use by the City of New York, dated April 28, 1897.

Also a letter from Charles H. T. Collis, Commissioner of Public Works, to Hon. Ashbel P. Fitch, dated April 20, 1897.

Also letter from Charles H. T. Collis, Commissioner, to Hon. A. P. Fitch, Comptroller, dated April 30, 1897.

70 And also letter dated June 23, 1897, from Eugene E. McLean, Engineer, to Hon. Ashbel P. Fitch, Comptroller.

NEW YORK, April 28, 1897, 11 o'clock A. M.

Minutes of a conference in the matter of claims by owners of property on the Byram river, in the State of Connecticut, for damages alleged to have been sustained by the diversion of the water of said river for use by the City of New York.

Present—Gen. CHARLES H. T. COLLIS, Commissioner of Public Works; GEORGE W. BIRDSALL, Chief Engineer of the Croton Aqueduct, and STEPHEN G. WILLIAMS, No. 45 Exchange place, representing property-
71 owners.

Mr. Birdsall said: For your understanding, I will state that the Byram river, from the dam at Portchester, where it enters the Long Island Sound, to the New York State line, is about 45,000 feet on each side. The City of New York has diverted the water from 8.66 square miles of the drainage area of this stream in New York just north of the Connecticut State line. The City of New York has settled, by private arrangement, with all the present mill owners on the stream, which involves to a certain extent the settlement of about 15,000 feet of this length of 45,000 feet of the Byram river. Of about 10,000 feet of the lower end
72 of this river one-half is in the State of New York and the other half in the State of Connecticut. North between this and the New York State line the whole of the river on both sides is in the State of Connecticut.

Gen. COLLIS—I understand it perfectly. The meanderings make this. What proportion have you settled?

Mr. BIRDSALL—We have settled with the mill owners.

Gen. COLLIS—What other riparian owners are there? 73

Mr. BIRDSALL—The parties who own land contiguous to the stream on both sides.

Gen. COLLIS—How does our taking of the water interfere with their use of it?

Mr. BIRDSALL—It diminishes the quantity of water flowing past them.

Gen. COLLIS—But they have the use of the water for agricultural purposes the same as ever?

Mr. BIRDSALL—Yes, sir.

Mr. WILLIAMS—Will you state how much you paid to those with whom you have settled?

Mr. BIRDSALL—We paid $379,000. 74

Mr. WILLIAMS—For about 15,000 feet?

Mr. BIRDSALL—A portion of that 15,000 feet is not fully settled for because the mill owners had rights of flowage and the adjoining owners have still to be settled with in some form or shape; there are about 100 of these that have an interest in the balance of the stream; most of them have small village lots alongside the flowage, so that they really have little interest; there are about thirty-five all told who have certain rights.

Gen. COLLIS—The City of New York has taken nothing but the use of the water?

Mr. BIRDSALL—No, sir; that's all.

Gen. COLLIS—We have not condemned or taken any 75 land?

Mr. BIRDSALL—No, sir.

Gen. COLLINS—And this water flows into one of our reservoirs?

Mr. BIRDSALL—It flows into the Kensico reservoir.

Mr. WILLIAMS—The City has caused it to flow there.

Gen. COLLIS—Are these claims over or below the point at which we have diverted the stream?

Mr. BIRDSALL—Below the point at which we have diverted the stream; above the point is in the State of

76 New York, where we have taken more or less land contiguous to the stream and are now taking more.

Mr. Williams—I represent some twelve or more owners of the land on the Byram river, in the State of Connecticut, holding, in all, upward of 18,000 feet on the river; desiring to arrive at a settlement in behalf of my clients without further litigation, I attend a meeting at the Commissioner's office, understanding that any statement made by me here will be regarded as made in an effort to arrive at a settlement without litigation, and will not be used against my clients in the event of litigation.

Gen. Collis—Certainly.

Mr. Williams—The owner of land on a river is legally
77 entitled to the flow of that river absolutely undiminished except as it may be diminished or retarded by an upper riparian owner for the usual agricultural or mill purposes; any diversion of the stream, carrying the water completely away from the river so that it cannot in any way get back into it is a violation of a property right which has been almost uniformly enjoined by the Courts.

Gen. Collis—Do I understand that the diversion of this stream takes all the water from the former bed of the river?

Mr. Williams—Roughly speaking, I understand that during nine or ten months of the year the diminution of the flow of the water through the river would be almost nominal; that during any period of the year when there
78 was a prolonged drought the flow of the river at the point where the dam was placed by the city would be practically stopped; I am trying to make this as fair a statement as I possibly can.

Gen. Collis—Do I understand that if we settle for damage we may have inflicted now, this is a settlement for all time, and that we get a release to that effect, notwithstanding the fact that at some future time we may be compelled to take even more water than we take at present?

Mr. Williams—Yes; the plan is to give a general

release of all our rights to any of the water which 79
may be diverted by the City. Under this the City will be permitted to take all the water north of its present dam, and might very possibly in the future take it all. As the preceding questions and answers show, it is possible, and perhaps probable, that in the future all of the water will be taken.

In behalf of two of my clients I brought suit for an injunction to restrain the City from taking or diverting any of the water of the river. I made a motion for a preliminary injunction before Judge Wheeler, of the United States Circuit Court, which was denied. I appealed on behalf of my clients from his order to the United States Circuit Court of Appeals, which, in its decision, while admitting all the legal arguments in 80
behalf of the complainants, stated that owing to the great public interests involved, it would be fair to appoint a master, and declared that it would appoint a master, but that my clients would not be bound to accept the order, but could have other remedies, namely, legal ones.

It is my intention, unless a settlement is effected otherwise, to bring this case to final hearing, and I hope eventually to obtain an injunction from the highest Court.

The City made, Mr. Birdsall says, a settlement with a number of the property-owners on the Byram river, and these property-owners were all mill-owners. In that settlement the City paid about $376,000, and ac- 81
quired some 15,000 feet of frontage on the river, leaving about 30,000 feet of frontage on the river without mill ownership at present. Now, the highest price which any one of the people I now represent has asked me to insist upon for him is $2 a running foot, and that goes down to as low as a dollar a running foot.

Mr. BIRDSALL—Is $2 a foot and $1 a foot for one side only or for both sides? Mostly your claimants own only on one side.

Mr. WILLIAMS—On one side of the river.

Mr. BIRDSALL—On both sides would be $4 a foot?

Mr. WILLIAMS—The average price at which my people are willing to settle would be about $1.50 a running foot for each side of the river.

Mr. BIRDSALL—My 45,000 feet is the river on one side, making 90,000 feet on both sides. We have settled for 15,000 feet, which really makes 30,000 feet if we consider both sides of the river.

Mr. WILLIAMS—I represent about 18,000 feet only on one side of the river.

Gen. COLLIS—Do you represent any clients through whose property this river runs, who have frontage on both sides of it?

Mr. WILLIAMS—Yes, but they would only claim for one frontage, I presume. Yet I don't put it that way. I claim for both frontages, but I reduce the amount per running foot, which produces the same result. I thought it would be simpler to take the basis per running foot and make the price lower per running foot if they owned on both sides of the river. What I am getting at is this, that in the settlement which has already been made with the City there remains in all about 60,000 feet to be settled for. If these owners were settled with on the basis of $1.50 per foot, it would take $90,000 to settle with them as against $376,000 paid for the other 30,000 feet, which seems a small sum, even although the owners already settled with had mill sites. This settlement with the mill-owners was made some ten years ago and they were paid. They have had the water flow, almost as it had been accustomed to flow, during some part of the time as it had been accustomed to flow, and had the benefit of the investment of their money for ten years. No effort had been made on the part of the City to make any settlement with any of the property-owners whom I represent. The City has deliberately attempted to take property belonging to my clients, who are citizens of another State and whose property is in another State. I have made in behalf of my clients, as Mr. Birdsall knows, and will, I am sure, corroborate me, a number of efforts during the past two

years or more to obtain a settlement of some kind with 85
the City, and I have repeatedly stated to Mr. Birdsall, to the Corporation Counsel, and endeavored several times to make the same statement to Gen. Collis, but never could get hold of him, that I was endeavoring to persuade my clients to accept something like a reasonable sum, urging upon them the fact that it was more or less of a necessity for the City, although the City could have taken the water from some other place, but that if the City were approached in a fair way, it would deal liberally with them; that there was no way in which the City could condemn the property and take the water, and that eventually the United States Court would enjoin the City from taking it until they paid or settled in some way, and it was not until I found my 86
patience exhausted that I was prepared to advise them, or any of them, to begin their action for injunction. Now the way in which we have based our damages is of course largely on conjecture. All the decisions of all the highest courts in England, New York State, Connecticut, and in the United States Courts, say that it is impossible to find out the damages to riparian rights, and the only way to grant the damaged party a remedy is by granting him an injunction, and if the United States Court follows the precedents laid down it will eventually grant an injunction in these cases. The Counsel to the Corporation states that he is distinctly of the opinion that the United States Court will never grant an injunction in such a case as this, but will 87
appoint finally a master to assess the damages, or refuse the injunction.

Mr. BIRDSALL—I will state that in the proceeding on the Bronx river for the payment of damages below our dam built at Kensico, and extending from Kensico to Williamsbridge, a distance of about 14 miles, the awards made to the riparian owners ran from 10 cents to $2.30 a running foot along each side of the stream.

Gen. COLLIS—Was this by amicable settlement?

88 Mr. Birdsall—By commission. I state this to show what we have paid before. This was land without any special water or mill powers, so that I think the measure of damages could be in most of these cases easily ascertained by merely comparing them with the amount we have paid through a Commission along the Bronx. In fact we had folks who obtained damages on the upper end of the Bronx, just below the dam, state before other Commissioners farther down the river, that they had as much water as they had before, even after the dam had been built, and that the damages paid for the lands immediately below the dam along the river were greater than they were at the lower end of the river. This, of course, was partially on account of hav-
89 ing had a chance to see what the effect of diversion of the water would be; and secondly, because as you get lower on the river, the drainage area is increasing, and the quantity of water running into the stream is increasing also. The drainage area is a big factor with regard to the steady supply of water in the lower stream on the Byram river. The large swamp through which we built our dam, and which is about two miles square of area just below our dam, acts as a sort of reservoir to to hold the water in wet weather and allows it to pass down, by percolation, into the stream in dry weather; so that the measure of damages through this swamp and contiguous to the mill ponds, for which we have made settlement for the power and diversion of the
90 water, will be very much less than that on the stream where there is a good fall and no other disturbing elements—subject, of course, to what water rights there may be still in the stream to build dams and use the water for power.

Mr. Williams—In answer to this it may be said that this is a settlement for all time. The factor for giving the stream a supply of water, namely a swamp, may be no longer a factor some years hence, as that swamp may be so drained that it would be of no benefit whatever to the river, and it is ques-

tionable whether the water would be healthful if the 91
flow were confined, during certain seasons of the year, to that alone. The use of the water of the stream is, by authority of Chancellor Kent, confined not only to its practical uses, but even to its use as a beautiful thing of nature, and the damages are reasonable when they are paid for that loss. The land along this river is largely at present used as farming land. A railroad has been projected through this valley and may perhaps never be completed, but a trolley road is already under construction. The hills on either side of this river have fine building sites overlooking the Long Island Sound, and some of these are already occupied by buildings of the most expensive character, and land within a short distance of this river has sold at as high 92
a rate as one thousand dollars per acre for building sites for wealthy New York citizens and others. A considerable, or at least a large part of the value of some of these places is made up from this stream running through it.

In the case of Mr. Samuel Pine, one of the people I represent—there is on his land a valuable feldspar deposit, and he has erected a mill where he grinds the feldspar, and he supplies the power with water from the river; on the opposite side of the river from him is another feldspar deposit on the property of the estate of J. T. Pentz, of which I am the administrator and representative, and it has been suggested that it would be advisable for Mr. Pine and the estate of J. T. Pentz 93
to build a dam for the purpose of developing these quarries of feldspar. This feldspar deposit is of considerable commercial value and, if properly developed, the industry would receive considerable benefit if the material could be crushed and ground by water power. I think that is true from what I know.

Mr. BIRDSALL—It is of no value unless ground.

Mr. WILLIAMS—Under the laws of the State of Connecticut parties can erect a dam and flow their neighbors' land and make compensation to them as

94 awarded by a Commission appointed by the courts. In view of the fact that the parties represented by me are citizens of Connecticut, that they have come willingly to the City to endeavor to make settlement with them rather than to litigate the matter, and in view of the fact that it is impossible for the City to condemn this property and take it under any statute, I think that the City should make a more liberal offer of settlement than they would in the case of a proper owner being a citizen of the State of New York, with the property in the State of New York, which they could condemn by public proceedings.

95

DEPARTMENT OF PUBLIC WORKS,
COMMISSIONER'S OFFICE,
No. 150 Nassau Street,
NEW YORK, April 20, 1897.

Hon. ASHBEL P. FITCH,
Comptroller:

DEAR SIR—In the matter of the suit brought in the United States Circuit Court by the owners of riparian rights on the Byram river in the State of Connecticut, to enjoin the City of New York from diverting the water of that river from its use, the Counsel to the Corpora-
96 tion advises me that, some time prior to the hearing of the motion for the injunction, a settlement, or at least an authoritative effort at settlement of the claims of these owners should be made on the part of the City.

I fully concur in his views, as expressed in his letter of the 12th instant, of which I inclose a copy, and have requested Mr. Stephen G. Williams, of Moran & Williams, No. 41 Wall street, who represents the plaintiffs and the owners of a large part of the river frontage in Connecticut, to join in a meeting at this

office for that purpose at his earliest convenience 97
Chief Engineer Birdsall will be present with the necessary maps of the river and the property. As the law requires your assent to any such settlements, it is desirable, for the purpose of expediting the proceedings, and to give them the full weight as evidence in Court, if necessary, that you be present at the meeting in person or by authorized representative. I would therefore ask you to advise me at once if you are willing to be present or represented at such a meeting, and to name the earliest day of your convenience for the same.

Yours respectfully,

(Signed) CHARLES H. T. COLLIS,
Commissioner of Public Works. 98

(Copy.)

DEPARTMENT OF PUBLIC WORKS,
COMMISSIONER'S OFFICE,
No. 150 NASSAU STREET,
NEW YORK, April 30, 1897.

MY DEAR SIR—I have the honor to inclose you a memorandum of a discussion which recently took place before me, in regard to the claims by owners of property on the Byram river in the State of Connecticut, for damages alleged to have been sustained by the 99
diversion of the water of said river for use by the City of New York.

When you have read the inclosed, I shall be glad to confer with you in regard to the same.

Yours truly,

(Signed) CHARLES H. T. COLLIS,
Commissioner.

Hon. A. P. FITCH,
Comptroller.

100 (Copy.)

JUNE 23, 1897.

HON. ASHBEL P. FITCH,
Comptroller.

SIR—In the matter of compensation to land-owners on the Byram river, on account of their riparian rights being interfered with by the diversion of the waters of the river, above the dam, I have the honor to report:

The Byram river, rising in this State, runs in a southerly direction, partly through New York, and partly through Connecticut, to the Sound, which it empties into at Portchester.

101 Just north of the Connecticut State line the city has built a dam, and diverted the waters of the river by a tunnel and waterway, carrying them into Kensico Reservoir. The watershed of that part of the river north of the dam is $8\frac{66}{100}$ square miles, and the amount of water so diverted is estimated at about 7,000,000 gallons per day.

The Byram river from the dam at Portchester where it enters the sound, to the New York State line, is about 45,000 feet on each side.

The City of New York has settled, by private arrangement, with all the present mill-owners, which involves, to a certain extent, the settlement of about 15,000 feet of this length of 45,000 feet, of about 10,000
102 feet of the lower end of the river, one-half is in the State of New York, and the other half is in the State of Connecticut. The sum of $379,000 has been paid to the mill owners in this lower 15,000 feet, but this does not settle with the property owners. The mill owners have the right of flowage, but the rights of the adjacent owners remain to be settled with in some way for the riparian river rights.

Between this 15,000-foot point and the State line, where the stream is entirely within the State of Connecticut, are located the claimants against the

State of New York for damages on account of the diversion of the waters of the river. The distance is about 30,000 feet on east side, making 60,000 feet in all on both sides.

The legal aspects of the matter are presented by the Counsel to the Corporation in a communication to Commissioner Collis, under date of April 12, 1897.

The Counsel says the City is "being sued in the "United States Circuit Court for an injunction to pre- "vent such a use of the dam now building on the West "Branch of the Byram river as would cause a diminu- "tion of the flow of that river through the State of "Connecticut.

"A motion for a temporary injunction was denied "by Judge Wheeler of the United States Circuit Court, "and an appeal from such denial, taken by the plain- "tiff, is now pending in the Circuit Court of Appeals, "and will probably be reached in a short time.

"Although we have been, thus far, successful, and "have no reason to expect an adverse decision as far "as the temporary injunction is concerned, yet I can- "not say that the case is free from damage when it "shall come to be submitted to the Court upon the trial "of the action.

"*Undoubtedly the right of the riparian owner to an un- "diminished flow of the stream is a property right which "we have no right to deprive him of without making com- "pensation*, and we have always been willing to make "such compensation, if a reasonable basis of settle- "ment could be arrived at."

As we *cannot condemn* property rights under a New York statute, and as there is no statute of Connecticut authorizing us to condemn property for the benefit of a New York municipality, "there is no way in which "we can compel a judicial determination as to the value "of the property rights we are about to destroy." The Counsel says there is nothing to do except to try to arrive at an agreement with the claimants, or else to wait till we "are sued for an injunction, and then come

106 "into Court asking that the amount of damages be "ascertained in some judicial manner, consenting that, "when it be so ascertained, an injunction issue, unless "we pay such damage."

The Counsel says to the Commissioner, "You have "ample power under the law to settle claims for dam- "ages of this character," and states that "one of the "agreements addressed to the Court in opposition to "an injunction has been that the plaintiff failed to "show that he had made any attempt to settle with "you."

The Counsel then says that Mr. Stephen G. Williams, of the firm of Moran & Williams, called upon him and said that he represented the owners of about eighteen
107 or twenty thousand feet of frontage upon the river, and that he desired "to agree with you upon a sum per "foot in settlement of the claim of the owners of all this "property."

He says he thinks it would be wise to pay "a some- "what larger sum, by way of damage, than we would "consent to pay in a similar case if the property affected "were situated in this State, and we could proceed to "condemn it."

He finally says: "In any event, I think it would be "wise if you were to send for Mr. Williams and try to "agree with him upon some basis of settlement of these "claims, so that it shall not be said that we were un- "willing to make any attempt to settle."

108 A meeting was held by Commissioner Collis at his office, at which were present, besides himself, Mr. George W. Birdsall, Chief Engineer, Croton Aqueduct, and Mr. Stephen G. Williams, representing the property-owners.

In the minutes of that meeting occurs the following in the statement of Mr. Williams, page 5:

"Now, the highest price which any of the people I "now represent has asked me to insist upon for him is "$2 a running foot, and that goes down as low as a "dollar a running foot.

"Mr. BIRDSALL—Is $2 a foot and $1 a foot for one 109
"side only or for both sides? Mostly your claimants
"own only on one side.

"Mr. WILLIAMS—On one side of the river.

"Mr. BIRDSALL—On both sides would be $4 a foot.

"Mr. WILLIAMS—The average price at which my
"people are willing to settle would be about $1.50 a
"running foot for each side of the river.

"Mr. BIRDSALL—My 45,000 feet is the river on one
"side, making 90,000 feet for both sides. We have
"settled for 15,000 feet which really makes 30,000 feet,
"if we consider both sides of the river.

"Mr. WILLIAMS—I represent about 18,000 feet only 110
"on one side of the river.

"Gen. COLLIS—Do you represent any clients through
"whose property this river runs, who have frontage on
"both sides of it?

"Mr. WILLIAMS—Yes, but they would only claim for
"one frontage I presume. Yet I don't put it that way.
"I claim for both frontages, but I reduce the amount
"per running foot, which produces the same result. I
"thought it would be simpler to take the basis per
"running foot and make the price lower per run-
"ning foot if they owned on both sides of the river.
"What I am getting at is this, that in the settlement
"which has already been made with the City there re-
"mains in all about 60,000 feet to be settled for. If 111
"these owners were settled with on this basis of $1.50
"per foot, it would take $90,000 to settle with them, as
"against $376,000 paid for the other 30,000 feet, which
"seems a small sum, even although the owners already
"settled with had mill sites."

On page 7 of the Minutes Mr. Birdsall says:

"I will state that in the proceeding on the Bronx
"river for the payment of damages below our dam,
"built at Kensico, and extending from Kensico to
"Williamsbridge, a distance of 14 miles, the awards

112 " made to the riparian owners ran from 10 cents to
" $2.30 a running foot, along each side of the stream.

" Gen. COLLIS—Was this by amicable settlement?

" Mr. BIRDSALL—By commission."

This is all that is recorded bearing definitely on the measure of damages. Mr. Williams, representing some twelve or more owners of land, holding, in all, upwards of 18,000 feet on the river, may be considered as offering the price of $1.50 per foot on each side of the river, as a fair adjustment for the damage caused by the diversion of the waters.

The Counsel to the Corporation says there is no doubt of the liability of the City for these damages.
113 Being in Connecticut there is no judicial means by which the value can be ascertained. The standing offer of the Department of Public Works of 50 cents per foot has in no case been accepted.

It is impossible to estimate with any reasonable exactness the value of such damages, but to get rid of troublesome and expensive suits and, at the same time, to show a willingness to pay a reasonable and just amount, I think the City would be justified in making the liberal offer of $1.50 per linear foot on each side of the river for the part between the dam on the state line and the part already paid for, being about 60,000 feet, both sides of the river; and 50 cents per running foot for the riparian rights of property owners, about
114 15,000 feet on the easterly side, and 5,000 feet on the westerly side, 10,000 feet on the westerly side being in the State of New York. Our settlement with the mill owners did not include these riparian rights.

This offer, being liberal, will probably result in the purchase of all these claims; any less offer I do not think would.

If the owners should not be satisfied with the offer, we would be able to go into court with the proper show of willingness to pay what is just and fair.

Respectfully,

EUGENE E. MCLEAN,
Engineer.

Mr. DYKMAN—Objected to on behalf of the City of New York, on the ground that this action was commenced and the complaint verified on the 24th of March, 1896. That the minutes show that the meeting of April 24, 1897, was a meeting evidently held for the purpose of an attempt at settlement; that any conversation which might have been had by the Chief Engineer of the Croton Aqueduct or by the Commissioner of Public Works with counsel for Mr. Pine in this proceeding can have no effect on the issue herein, and on the further ground that all such conversations and conferences were had and taken without notice to the Corporation Counsel of the City of New York; that he was not represented at such proceedings and had no notice of the same, and that all of the minutes of such conference were incompetent, improper and immaterial, and that the statements contained therein could only be used in contradiction or impeachment of General Collis or Mr. Birdsall, if they had been sworn on behalf of the defendant herein. That the letter to Mr. Fitch under date of April 20, signed by Charles H. T. Collis, is also incompetent and immaterial. 115 116

And on the further ground that the facts stated by Commissioner Collis in his letter of April 20, prior to the passage of the new Charter of the City of New York, cannot at this date have any effect whatever. There is now no power vested in the Commissioner of Public Works and the Comptroller to acquire any real estate whatever except with the approval of the Board of Estimate and the Board of Municipal Improvement. 117

And on the further ground that the communication under date of April 30, 1897, signed by the Commissioner of Public Works, simply called the attention of the Comptroller to a discussion which cannot be considered as evidence on the part of any party in this proceeding.

The same objection is made to the communication of the Comptroller, dated June 23, 1897, signed by Eugene E. McLean, Engineer, and on the further ground

118 that McLean, although an engineer in the employ of the Comptroller's office, had no power to bind the City, and that since the date of his letter the power of settlement has been taken from the hands of the Comptroller and the Commissioner of Public Works, no proceeding having been instituted as required by the Charter to continue the right in the City officials to acquire these lands under that statute.

Further hearing adjourned to Friday, April 14, same place and hour.

119

SAMUEL PINE and another

against

THE MAYOR, ETC., OF NEW YORK.

NEW YORK, May 5, 1899.

TESTIMONY FOR COMPLAINANTS, TAKEN BEFORE JAMES A. RENWICK, ESQ., EXAMINER.

120 Appearances—Mr. WILLIAMS, for complainants (Mr. CHARLES C. MARSHALL, of counsel); Mr. HENRY T. DYKMAN, for defendants.

GEORGE W. BIRDSALL, recalled on behalf of the complainants:

By Mr. MARSHALL:

Q. Mr. Birdsall, you have testified, have you not, that the drainage area north of the State line, where

the Byram river, or the West Branch of the Byram river crosses the Connecticut line, is about 8.66 square miles? *A.* Yes, sir. 121

Q. And then that the drainage area between that point where the river intersects the Connecticut State line and a point just above the junction of the East and West Branches of the Bryam river is about four square miles? *A.* Yes, sir.

Q. So that those two drainage areas would make 12.66 square miles? *A.* Yes.

Q. Then you have testified that your estimate of the water flow there to-day is about one million of gallons per square mile?

Mr. DYKMAN—The record shows what he swore to. 122

Q. Then the flow estimated there by you would be something over 12,000,000 gallons per day?

Objected to by Mr. Dykman as incompetent, irrelevant and immaterial, and calling for a conclusion of the witness, and no definite period of time stated.

A. Yes, sir.

Q. You testified that if the City of New York diverted all of the water which flowed into the reservoir formed by the dam that the decrease in the flow of the Byram river just above its junction with the East Branch would be about one-half?

Same objection. 123

A. That I don't remember.

Q. Will you give us your opinion on that point?

Same objection.

A. Well, it would be at least one-half.

Q. Isn't it your opinion that it would be on the basis of those figures which you have stated nearer two-thirds than one-half?

Same objection.

124 *A.* It would be somewheres between two-thirds and one-half.

Q. It might be as much as two-thirds on the basis of those figures?

Same objection.

A. It might.

Q. Now, you have testified that the drainage area of the East Branch is from seven to twelve square miles, have you not?

Objected to by Mr. Dykman on the ground that the East Branch is below the dam and in the State of Connecticut, and below the reservoir which the City of
125 New York owns.

A. Yes, sir.

Q. Now, assuming that this diversion at the dam takes place, that we have stated above, isn't it your opinion that the flow in the Main Branch of the Byram river, below the junction, may be decreased as much as one-third?

Objected to as clearly immaterial, his opinion of what may happen, and as incompetent and improper.

A. All I can say, I do not know enough of the topography of the East Branch, especially not knowing its actual drainage area, there being a disputed point as
126 to certain portions of that drainage area, whether it drains into the East Branch or whether it drains into the Mianus; therefore, I could not answer this question

Q. What is your opinion as to whether the drainage area of that East Branch is nearer seven square miles or twelve?

Objected to on the ground that the East Branch is far below the dam, that it strikes the Byram river some miles below the State line, and has never been interfered with by the City of New York.

A. That was the point which I called your attention to in my former answer, and I have seen no surveys—accurate surveys which would determine that point. 127

Q. Then you cannot say whether it is nearer seven or twelve? *A.* No, sir.

Q. You remember testifying on an earlier hearing in this case that the decrease in the flow of the main river below the junction of the East and West Branches would be decreased under the circumstances which I have stated about a quarter?

Objected to on the ground that the City of New York, by deeds from Russell, Birdsall and Ward, Tingue, House & Co. and Reynolds and others, acquired those rights, and the Statute of Limitations runs against them, sixteen years having elapsed since said deeds. 128

A. With regards to the amount from the City's dam north, I did make that statement.

Q. Can you explain to us what you mean by those words "with regards to the amount from the City's dam north"? *A.* That is, comparing the amount from our dam—the amount of water obtained from our dam north, and the amount obtained below the East Branch of the Byram river, on the stream itself, I made the statement as you said, that it would be about one-quarter the amount diverted.

Q. Now, Mr. Birdsall, if the decrease just above the junction, under the circumstances I have stated, is as much as two-thirds, then the decrease below the junction, in the main branch, under the same circumstances, would be more than a quarter? 129

Objected to, that there is no proof of that here.

A. Taking the basis of the East Branch of Byram river——

Q. May I interrupt you? I think I am entitled to an answer, yes or no.

Question repeated.

A. Yes.

130 *Q.* Mr. Birdsall, the West Branch of the Byram river rises from the Wampus Lake and Byram Lake, does it not? *A.* Those are the head waters.

Q. What lakes form the head waters or contribute to the flow of the East Branch? *A.* That I don't know.

Q. Are there any lakes that contribute to the flow of the East Branch? *A.* Not that I know of.

Q. You would know if there were any lakes? *A.* I would not; no, sir.

Q. You can tell by examining the topographical map of the State of Connecticut for us, couldn't you?

Objected to on the ground that it calls for the examination by the witness of a map in evidence and not
131 proven to be accurate.

A. Well, I don't know; there might be a large swamp that might have a lake just before; I would want to drive over the ground myself to know it.

Q. Eliminating the question of a swamp, or the possibility of a swamp, can you not tell us whether that East Branch rises from or is contributed to by any lakes in the State of Connecticut or New York.

Objected to that it is immaterial where it rises.

Q. What is your opinion?

Same objection.

132 *A.* Depend upon the map.

Q. You know the topographical map, do you not, of the State of Connecticut? *A.* Who is it made by?

Q. U. S. Geological Survay, in co-operation with the State of Connecticut? *A.* Yes, I know that map.

Q. Now, won't you look at this page 31 and tell me whether the East Branch is fed by any lakes as appears from that map.

Same objection, and the further objection that the map does not show upon its face the meaning of the various colors and the various lines.

A. According to this map there is only one small pond feeding the waters of the East Branch. 133

Q. And what is that small pond? *A.* I don't know its name.

Q. Have you ever driven down the banks of the East Branch? *A.* I have driven over the roads that were supposed to be there.

Q. Did you ever see any lakes contributing to the flow of the East Branch of the Byram river? *A.* I did not.

Q. What is the size of Wampus Lake? *A.* About twenty acres.

Q. And what is the size of Byram Lake? *A.* Originally?

Q. Well, what is its present size?

134

Objected to on the ground that Byram Pond is not a lake and was created by Russell, Birdsall & Ward and others, who purchased the right in 1864 and 1866 to increase the superficial area on two different occasions and built the pond, and that Byram Pond as it now exists is not what is generally known as Byram Pond and that these persons purchasing these rights now owned by the City owned the right to dam the waters back to the extent of their deeds, and also objected to as too remote.

Q. Mr. Birdsall, will you give us the size of Byram Lake at the time that the City of New York commenced the construction of the dam involved in this suit?

135

Objected to on the ground that there is no Byram Lake; it is a storage reservoir which the City purchased, Byram Pond having been obliterated.

A. When full, it covered about one hundred and twenty acres.

Q. How are these lakes fed, the Wampus Lake and the Byram Lake; are they fed by springs? *A.* No, sir.

Q. Are there any springs in them? *A.* No, sir.

136 *Q.* How are they fed? *A.* By rainfall and the water coming off the adjacent hills and watershed.

Q. And only by rainfall? *A.* That is all.

Q. Now, when you testified as to the drainage area of the river north of the Connecticut State line, near the dam, you included in the 8.66 square miles, the watershed which supplies those lakes? *A.* Yes, sir.

Q. What was the purpose of this dam erected at the State line?

Objected to as immaterial.

A. To divert the water of same into the Kensico Reservoir.

137 *Q.* How far is the Kensico Reservoir from the dam? *A.* About five miles.

Q. Is there a diversion by a natural or artificial channel? *A.* Partially natural and partially artificial.

Q. Within the State of New York has the City of New York, to your knowledge, taken condemnation proceedings along the line of the Byram river and its branches.

Objected to as not the best evidence, the condemnation proceedings being a matter of public record.

A. We have filed maps for more or less of the property.

Q. Under the condemnation law you have done that? *A.* Yes, sir.

138 *Q.* Do you remember whether the law under which you acted there is chapter 445 of the Laws of 1877?

Objected to as calling for a conclusion.

A. Yes.

It is stipulated that on page 8 of the testimony taken on hearing of November 8, 1897, the law referred to as

chapter 445 of the Laws of 1887 of the State of New 139
York, should be chapter 445 of the Laws of 1877.

Q. Mr. Birdsall, that dam can divert 8,000,000 gallons a day?

Objected to as incompetent and immaterial.

A. Yes.

Q. Prior to the construction of that dam, all the water which flows into the reservoir formed by that dam flowed by the lands of Mr. Muller and Mr. Pine, plaintiffs in this suit, did it not?

Objected to. Counsel should state which dam—whether the City's dam or the Byram Pond Dam.
140

Q. (Continued) I am talking about the dam near the State line—the City dam I mean; the dam about 500 feet from the State line. *A.* At certain seasons of the year, yes; at other seasons of the year, no.

Q. Now, if there was any water that didn't flow by the lands of Mr. Pine and Mr. Muller prior to the construction of that dam, where did it go? *A.* It was absorbed by the big swamp just below the dam.

Q. Mr. Birdsall, do you consider yourself an authority on the value of riparian rights?

Objected to, as calling for the opinion of a witness on his own competency, and further that it is too remote.
141

A. I should say no.

Q. What is the approximate cost of this dam to the City of New York; I mean the dam about 500 feet from the State line?

Objected to as incompetent, immaterial and improper.

A. The dam, as a dam alone, without any of its appurtenances, cost about $45,000.

142 *Q.* Now, the dam and the work connected therewith has cost the City of New York upward of what?

Same objection, and further, it is too remote.

A. You mean the whole thing; the proceedings to get the water into Kensico?

Q. Did you not state that the dam and the work connected therewith had cost the City upward of $1,000,000? *A.* Well, it depends upon whether—I don't think under such a question as that I ever made that remark.

Q. Will you read from this affidavit and see: (Reading) "A dam is in process of construction in the State of New York, in the County of Westchester, a
143 short distance from the dividing line between the States of New York and Connecticut, but the said dam is not completed; said dam and work connected therewith has already cost the City of New York upward of $1,000,000, and will cost the City much more"; you remember making that affidavit on the 23d day of April, 1896, before G. L. Sterling, Notary Public, New York County? *A.* Yes.

Q. It was true, was it? *A.* That is to get that water to New York, entirely; the whole thing.

Q. Your statement on that point was fairly reliable and accurate, was it not?

Same objection.

144 *A.* Including taking the water to New York.

Q. Now you remember stating in that affidavit that you had made a careful estimate of the damages which would be suffered by the said complainants if all of the water of the said westerly branch of the Byram river should be diverted into the Kensico reservoir, and you estimate the damage to the said complainant Pine will be $1,862.50; you remember making that statement?

Objected to as incompetent, improper and immaterial, and on the further ground that no opinion ex-

pressed by the Engineer of the City Government would 145
bind the City in any event, the City having no general agents.

A. Yes.

Q. And you remember stating that the damage to the complainant Muller would be $572.50?

Same objection.

A. Yes.

Q. Now, that statement was not intended by you to be a definite or reliable one, was it? *A.* From the facts in my possession.

Q. Well, if you were not a judge of riparian rights or values, your testimony on that point wasn't to be 146
taken as reliable, as your statement on the cost of the dam, for instance?

Same objection.

A. No, because one I knew all about, and the other I knew only partially.

Q. You are acquainted with the Town of Portchester, are you not? *A.* I am.

Q. Do you know about what its population is? *A.* No; I couldn't say; I think about 3,000 to 4,000.

Q. You never have examined that? *A.* No.

Q. Is the topography of the country in the valley of the Byram river such that the Byram river flows towards and through Portchester? *A.* It flows into 147
a branch of the sound at Portchester.

Q. Is the topography of the country—the grade line—such that the water of the Byram river could be conducted by gravity to the Village of Greenwich?

Same objection, as incompetent and immaterial.

A. Some portions of it.

Q. What portions of it?

Objected to as incompetent, improper and immaterial.

148 *A.* Those portions of it which were higher than the highest ground there is in the Town of Greenwich.

Q. Mr. Birdsall, it is true, is it not, that the whole of the Village of Greenwich lies lower than the Byram river at the land of Mr. Muller and Mr. Pine?

Objected to as incompetent and immaterial.

A. I don't know.

Q. Can you give us your opinion on it? *A.* I don't know, because I do not know the limits of the Town of Greenwich; I know a man that lives in the Town of Greenwich, and he is seventy-two feet above the tide.

Q. You know what the elevation is above sea level at the lands of Mr. Pine? *A.* I do not; that is, I
149 don't remember.

Q. Well, do you think it is as much as 300 feet? *A.* I know it is not 300 feet, because I know the level of my dam and I know what that is, and I know what they are; I don't know what the difference is.

Q. Do you think it is as much as 200 feet? *A.* I doubt it.

Q. Would you say that it wasn't? *A.* No, sir.

Q. Now, Mr. Birdsall, is the water from the West Branch of the Byram river, that you have testified is diverted by this dam, of any value to the City of New York?

Objected to as not the way to prove its value; ques-
150 tion withdrawn.

Q. You understand the nature of this action, do you not, or suit? *A.* I do.

Q. You know it is a suit for an injunction to prevent the City from diverting the water? *A.* Yes.

Q. Now, I simply ask you if there is any value in it to the City of New York?

Same objection, and further that there is no limit fixed when.

Mr. MARSHALL—Well, now.

A. Yes.

Q. Do you know what the City of New York charges by meter for Croton water?

Objected to as incompetent and improper.

A. I do.

Q. What is it?

Objected to as too remote, and not stating under what circumstances, whether for factories, hotels or private houses.

A. For all business places, 10 cents per 100 cubic feet.

Q. How many gallons in 100 cubic feet? *A.* About 748.

Q. Now, what other meter charge is there? *A.* That is the only meter charge.

Q. How do you base the charge for private dwellings?

Same objection.

A. Depends upon the size of the dwelling and number of families in it.

Q. Where there is no meter? *A.* Where there is no meter; there is very few meters in private houses; it depends upon the size and the number of families in the house.

Q. In your opinion is the charge for private dwellings where there is no meter substantially the same as the meter charge?

Same objection.

A. No.

Q. What is the difference? *A.* I should say about one-half.

Q. In favor of which? *A.* In favor of the private dwelling.

154 *Q.* The private dwelling is about one-half cheaper? *A.* Yes.

Map heretofore referred to and shown witness is marked "Complainants' Exhibit 1 for identification, May 5, 1899."

Complainants' counsel offers said map in evidence.

Objected to as immaterial, incompetent and improper; that there is no proof here of its accuracy, and it is not a public record.

Q. Mr. Birdsall, you referred to another dam up in this locality; what dam is that? *A.* The dam at
155 Byram Pond.

Q. Now, won't you tell us just where that is? *A.* It is about 400 feet south of the entrance of old Byram Pond.

Q. And on the pond or on the river? *A.* On the river and covers the pond.

Q. How long has that dam been there? *A.* Finished about a year ago.

Q. When was its construction commenced? *A.* About two years ago.

Q. Was it commenced after or before the construction of this dam down near the Connecticut State line? *A.* After.

Q. Under the same statutes? *A.* Yes.

156 *Cross-examined* (by Counsel for Defendant):

By Mr. DYKMAN:

Q. Mr. Birdsall, where is Byram Pond proper, in what town and in what State? *A.* In the State of New York; partially in Bedford and partially in Northcastle.

Q. Do you remember any transactions with Russell, Birdsall & Ward, Tingue, House & Co.?

Objected to by complainants' counsel as immaterial and irrelevant.

A. I do. 157

Q. How long ago? *A.* About 1884.

Q. So far as Wampus Pond is concerned, what action if any, has the City taken towards diverting its waters? *A.* None at all.

Q. Do you remember the heights of Byram Pond and the dam at or about the time of the City's transactions with these firms, the height of the dam?

Objected to as incompetent and immaterial.

A. I do.

Q. How much higher have you built it—meaning the City? *A.* Three and a half feet.

Q. That is the old dam? *A.* It is just above the old dam. 158

Q. All the action of the City has been above the East Branch of the Byram, has it not? *A.* It has.

Q. And in the State of New York? *A.* Yes.

Q. Byram Pond is formed, is it not, by streams and by the drainage area inside of the State of New York? *A.* It is.

Q. And Wampus Pond also? *A.* Yes.

Q. The plaintiffs in this action reside in the State of Connecticut, or their land is in the State of Connecticut? *A.* To the best of my knowledge.

Q. And all the water that you have diverted has arisen in the State of New York by drainage area or by springs? *A.* It has.

Q. And the land you have acquired has been within 159 the State of New York, has it not? *A.* It has.

Q. Your diversion has taken place in the State of New York? *A.* It has.

Re-direct (by Complainants' Counsel):

By Mr. Marshall:

Q. Won't you please tell us what you mean by the old dam? *A.* The old dam built by Russell, Birdsall & Ward, and Tingue, House & Co., and Wilcox & Co.

160 *Q.* Won't you tell me what you meant when you said that no action has been taken by the City in diverting the waters of Wampus Pond? *A.* It has built no dam or done anything with it; we left it as it was.

Q. But the water of Wampus Pond or lake flows into the Byram river above the dam? *A.* It does.

Q. And therefore any water that flows from it is diverted or may be diverted by the City? *A.* May be diverted by the City.

Q. Mr. Birdsall, in regard to this old dam which was built by Russell, Birdsall and those others, for what purpose was that built? *A.* It was built as a storage reservoir.

Q. And what was the object of these people having a
161 storage reservoir? *A.* So as to collect water in the wet season to use in the dry season for the purposes of their mill.

Q. The result being that the flow of the river was more uniform than it otherwise would have been? *A.* Yes.

Q. And in consequence thereof there wouldn't practically have been a time when the stream would have been dry?

Objected to.

A. I can't imagine the stream being dry at any time.

Q. From that old dam, after the water that was con-
162 fined by the old dam was used it flowed on down the Byram river? *A.* It does.

Q. After the water is used where you have confined it by the City dam, near the State line, it is diverted entirely from the course of the river, isn't it? *A.* It is.

Q. Is that dam in operation? *A.* It is.

Q. Diverting water now? *A.* It is.

Q. How long have you been diverting water? *A.* About two years last December.

Q. Is it your intention to divert water there con- 163
stantly?

Objected to.

Mr. MARSHALL—The intention is admitted in the answer.

Q. Is it your intention to divert it all the time, the year around? *A.* More or less of it.

Q. And more at one season than another? *A.* In quantity, yes.

Q. What season? *A.* In the winter season we divert most of it.

Q. You don't need it in the summer? *A.* Yes, sir.

Q. You divert it in the summer too? *A.* Yes. 164

Q. Any water flowing over the dam now; over the dam near the State line? *A.* No, sir.

Q. None flowing over now at all? *A.* No, sir.

Re-cross (by Defendant's Counsel):

By Mr. DYKMAN:

Q. Mr. Birdsall, you remember, do you not, the transactions between the City and Wilcox, Reynolds, Tingue and other mill-owners along the stream? *A.* I do.

Q. And they built a dam there, did they not; raised the dam at Byram Pond? *A.* They did.

Q. When they were filling that dam, did the water 165
run over the property belonging to the plaintiff in this action? *A.* It did not.

Q. For how many years did that state of affairs exist? *A.* To the best of my knowledge about seven years.

Q. There was a dam, was there not, an original dam at Byram Pond built by Reynolds, Wilcox & Co.? *A.* I don't know whether Reynolds was in it; Wilcox & Tingue, House & Co. were in it, and Russell, Birdsall & Ward.

166 By Mr. MARSHALL:

Q. By this dam you mean the old dam, to which you have already referred? *A.* Yes.

By Mr. DYKMAN:

Q. According to your best recollection, the City of New York now owns the fee of the land on which that dam was built, do they not? *A.* It does.

Q. Purchasing it from the persons who built it? *A.* Yes.

Q. And paying for it? *A.* Yes.

Q. About how many years ago? *A.* I think it was paid for in 1884; the payments might have been delayed in the Comptroller's office.

167

By Mr. MARSHALL:

Q. Well, you don't know that they were? *A.* No; the vouchers were made out in my office in 1884 for the payment of those things.

By Mr. DYKMAN:

Q. And Byram Pond, as I understand it, is a pond fed by natural streams or springs and drainage area within the State of New York? *A.* Yes.

By Mr. WILLIAMS:

Q. Mr. Birdsall, how much was paid by the City of
168 New York to these various people, Birdsall, Tingue & Co. for whatever rights they possessed in the water of the West Branch of the Byram river?

Objected to as too remote and incompetent and improper.

A. I would have to have a copy of the papers to get the exact wording of them; we got so many things in together, I don't know what it was.

Q. Mr. Birdsall, in this affidavit, which has been referred to before, which you made, you say, "In the case of all these existing dams, mills and factories,

the owners have settled with the City of New York for damages sustained by them by reason of the said proposed diversion, and the City has paid to them large sums of money as damages for interference with the natural flow of the said stream, to wit, upwards of $300,000"; is that statement in your affidavit correct? *A.* That is, including this pond reservoir. 169

Complainants' counsel asks to have marked, for identification, the blue tracing map of the Byram river and lands bordering on same in the State of Connecticut, annexed to the transcript of record in this case in the United States Circuit Court of Appeals, on appeal from the Circuit Court of the United States for the Southern District of New York. 170

Same marked "Complainants' Ex. 2 for Identification, May 5/99."

Complainants' counsel offers same in evidence.

Same objection as before.

EDWIN A. KNAPP, being duly sworn and examined as a witness for the complainants, testifies:

Direct examination:

By Mr. MARSHALL:

Q. Where do you live? *A.* Greenwich, Conn.

Q. How long have you lived there? *A.* The greater portion of my life. 171

Q. What county is Greenwich in? *A.* Fairfield.

Q. How near are you to Portchester? *A.* Three miles.

Q. How far from the Byram river, or the land owned by Mr. Pine and Mr. Muller, plaintiffs in this case; about? *A.* Well, I should say about three and one-half miles perhaps.

Q. What is your business? *A.* Real estate.

Q. Where is your office? *A.* Portchester.

Q. How long have you been engaged in the real estate business there? *A.* About four years.

172 *Q.* What was your business prior to that time? *A.* Retail dry goods.

Q. Whereabouts? *A.* Ten years in Greenwich and ten years in Portchester.

Q. How long have you been acquainted with the valley of the Byram river? *A.* All my life.

Q. Were you born in it? *A.* I was born on the Eastern Branch.

Q. How long did you live on the Eastern Branch? *A.* Twenty years.

Q. Did you own any land on the Eastern Branch? *A.* Well, my father's farm, on which I was raised, was located there.

Q. And owned by your father? *A.* Yes, sir.

173 *Q.* What is the relative or comparative size of the East Branch of the Byram river and its West Branch, just above the junction of the two? *A.* There is not very much difference, as far as I can judge from observation; of course, I never measured the flow of water.

Q. Now, I want you to tell us how low—give us some idea of how low you have seen the current of this river just above the junction in times of drought; I refer to both branches?

Objected to as incompetent, immaterial and irrelevant, and on the further ground that the City does not interfere with the East Branch of the Byram, and has the right to divert, so far as the plaintiffs are concerned,

174 the main waters of the Byram by deed and by statute of limitations.

A. I would say, by way of explanation——

Mr. Dykman—Please answer the question; don't explain.

The Witness—So far as the Eastern Branch is concerned I have seen it almost entirely dry, just a little water percolating through the bed.

Q. At what point? *A.* Well, at a point say th miles above the junction; I have always notic

little more water flowing through the Western Branch 175
at times of extreme drought.

Q. Now, give us an idea comparatively or relatively of how nearly dry or low down you have seen the current of the West Branch somewhere just above the junction; you can fix your own point? *A.* Well, I suppose the flow as I saw it there would fill at the driest time a six-inch water-main, perhaps; from four to six inches.

Q. Now, when did you see it in that condition? *A.* During the summer months; July and August, perhaps.

Q. How often; how many summers? *A.* Well, during the period of my younger manhood, while I was living in that country, I noticed it particularly.

Q. Every summer? *A.* I couldn't swear I have seen 176
it every summer; I have seen it at intervals.

Q. Have you seen it at times of extreme drought? *A.* Yes.

Q. And how low is it then? *A.* Well, about as low as I have already stated; probably fill from a four to a six-inch main.

Q. Have you also examined or seen during the summer months the Byram river below the junction of the East and West branches? *A.* Yes, sir.

Q. Can you give us an idea of what you have seen there of the current in the summer time? *A.* Yes, sir; I would say the bed of the river would be not far from twenty-five feet wide, and at such a time as you have described of extreme drought, there would be water 177
perhaps covering the whole of this surface, but just enough to cover it, but not with any considerable depth to it.

Q. Now, give us an idea of the current or stream of the main Byram river below the junction in the spring or fall? *A.* Well, of course, I never have measured the width of the bed, but I should take it to be about twenty-five feet wide at that point, and on an average not far from two feet deep; that would be my judgment.

Q. Have you examined the beds of the East or West

178 Branch, and the bed of the main stream this spring; have you passed them; been up there? *A.* I don't know that I have been there this spring; I was there in the fall; I was there last fall; I hadn't any occasion to pass up there this spring.

Q. You have followed your business of real estate agent or broker for four years in this vicinity? *A.* Yes.

Q. During that time you have bought and sold and acted in the purchase and sale of real estate? *A.* Yes.

Q. And in obtaining mortgages upon real estate? *A.* Yes, sir.

Q. Are you acquainted with the values of real estate in the neighborhood of the Byram river and in the
179 neighborhood of the lands of Muller and Pine, plaintiffs in this suit? *A.* Yes, sir.

Q. Are you acquainted with the assessed valuation of property in that vicinity? *A.* Yes, sir; familiar with that.

Q. What is about the value given by the assessors to assessed valuations there for the purposes of taxation, as compared with the fair and reasonable value at which property ordinarily sells?

Objected to as incompetent, improper and immaterial.

Q. Are you able to state, and do you know about how the assessed value compares with the fair and reasonable value of real estate?
180

Objected to as incompetent, improper and immaterial.

A. From fifty to sixty per cent.

Q. Have you examined the books of assessment in the town? *A.* I have.

Q. As to the value of Mr. Pine's farm? *A.* Yes, sir.

Q. And what have you found to be the assessed valuation? 181

Objected to, that the books are the best evidence.

A. $8,000.

Q. And what did you find to be the assessed valuation of Mr. Muller's farm there?

Same objection.

A. Assessed for $2,500.

Q. Now, Mr. Knapp, have you gone over Mr. Pine's farm? *A.* I have.

Q. Examined it? *A.* Yes, sir.

Q. Now, what in your opinion is the fair and reasonable value of Mr. Pine's farm? 182

Objected to.

A. $15,000.

Preliminary cross-examination:

By Mr. DYKMAN:

Q. What property have you bought or sold within four years there, in this neighborhood, as an agent? *A.* Well, while I ——

Q. Please name me one place that you have bought or sold? *A.* In this immediate vicinity; would you regard anything within the Town of Greenwich?

Q. I ask you that question, what property have you bought or sold yourself as agent? *A.* I bought a property on the Bellhaven shore road; about four miles from this property. 188

Q. You term within four miles this immediate neighhood, do you; I meant farm property, not a place on the Bellhaven shore road? *A.* None in that immediate vicinity.

Q. What is the nearest place that you bought as an agent? *A.* In Portchester.

Q. In the Village? *A.* Yes, sir.

Q. Village property? *A.* Yes, sir.

Q. Name me the last farm you have bought or sold

184 yourself either as principal or agent? *A.* We haven't dealt in any farm property.

Q. I am asking what you have bought or sold? *A.* Haven't bought or sold any farm; not in the last four years.

Q. Last five? *A.* No, sir.

Q. Last ten? *A.* Not in that vicinity; no, sir.

Q. How far from this; a farm? *A.* We haven't bought or sold farm property.

Q. Within what distance of the property in question have you bought or sold a farm either as principal or agent within ten years? *A.* Well, I have explained to you——

Q. I beg your pardon; will you please tell us within
185 what distance you have bought or sold a farm—— *A.* Personally I haven't bought or sold any.

Q. Either as principal or agent? *A.* No, sir.

Q. How many places have you sold in the last year? *A.* You refer to——

Q. Numerically speaking, all your real estate transactions, no matter where they are? *A.* I don't know; but two or three quite valuable places in Portchester.

Q. I am not speaking of the value; numerically speaking, how many? *A.* Well, the firm I belong to——

Q. What firm do you belong to? *A.* The firm of Knapp & Wakefield sold two places on Westchester avenue in the Village of Portchester.

186 *Q.* In the last year; how far from the railroad depot? *A.* Well, about two or three blocks.

Q. Country seats; villa sites, were they not? *A.* No; village property.

Q. Now, come to the question of farm property; what farm have you ever sold, as an agent or principal? *A.* We have not dealt in that property.

Q. No farm property? *A.* Not as an agent or principal; no, sir.

Mr. DYKMAN—I object that the witness is not compe- 187
tent to answer this question, on the ground that he has never bought or sold any farm property either as principal or agent; he has only been in business four years.

By Mr. MARSHALL:

Q. Taking a point from the south line of Mr. Pine's land northward up the Byram river and its branches to the State line, what farms have been sold within the last four years?

Objected to, unless the witness has personal knowledge, not what he has read or what he has heard; and defend-
ant's counsel reserves right to cross-examine witness as to 188
his personal knowledge; question withdrawn.

Q. Do you know of any farms that have been sold from the south line of Mr. Pine's farm, plaintiff in this suit, northward along the Byram river and its two branches, to the State line, within the last four years? *A.* Yes, I know of such having been sold.

Q. What do you know about that? *A.* Information that I had from the attorneys who negotiated the papers.

Q. How many such sales have come to your knowledge? *A.* Very few; very few transactions have been made there within the last four years.

Q. Can you tell us about how many that you have known about?
189

Objected to.

Q. How many farms do you know of having been sold in that locality that I have described?

Objected to, that the witness has stated that his entire knowledge consists of information received from others.

190 *Q.* What farms do you know by common report of having been sold?

Objected to on the ground that the plaintiff has no right to prove sales by common report, the testimony being hearsay.

A. Property sold by Peter Schreibweiss to C. B. Collins September 18, 1895; that is one sale that has been made within that period of time.

Q. How many sales do you know of by common report that have been made in this locality I have described in the last four years? *A.* Only two.

Q. Do you, as a real estate agent and broker in that vicinity, keep track of sales by inquiry? *A.* I endeavor
191 to do so; yes.

Q. Do you know anything about the prices paid on these two sales? And I ask you do you know of your own knowledge, not what some one has told you? *A.* No, sir.

Q. You testified to the value of Mr. Pine's farm, in your opinion, to be what? *A.* Fifteen thousand dollars.

Q. Last year you spoke of having sold some two or three parcels of real estate; did you act in renting others? *A.* Yes, sir.

Q. Can you give us any idea how many parcels of real estate in that general neighborhood of Portchester and the Byram river you acted in renting?

192 Objected to, unless it calls for similar property, not village property.

A. Of course, I haven't an exact record, but thirty or forty pieces.

Q. What value do you place on the average on farm land along the Byram river and in the vicinity of Portchester?

Objected to as incompetent, immaterial and improper.

A. All the way from $100 to $150 per acre.

Q. Can you give us a general idea of the character

of Mr. Pine's and Mr. Muller's property there and the 193
surrounding neighborhood, its uses? *A.* Well, Mr. Muller's place is used entirely for farming purposes, and Mr. Pine's is used in part for farming and also in part for getting out and manufacturing feldspar.

Q. And the property in the neighborhood of those farms – give us some idea of its character, as to whether it is all farming property or residential property, or what?

Same objection, as incompetent and improper.

A. Mainly farming property.

Q. All farming property? *A.* No, sir; not all, because there are manufacturing interests there, which, 194
of course, have houses where the operatives live.

Q. Is any of it used for residential, as distinguished from farming purposes, or exclusively residential purposes? *A.* There are a few such places; yes, sir.

Q. Well, give us their proximity to the Pine or Muller places? *A.* Well, we will say within a radius of a mile and a half from there; on King street, quite a number of very valuable places.

Q. In reaching your estimate of the value of Mr. Pine's farm, what have you allowed for the feldspar deposit, assuming that a feldspar deposit exists on that farm? *A.* Made no allowance for it.

Q. Have you included the improvements on that farm in your estimate of its value? *A.* Only the 195
farm, barns and house that is there.

Q. Is there a mill there for manufacturing feldspar? *A.* Yes, sir.

Q. Have you included that in this valuation of $15,000? *A.* No, sir.

Q. Then is it true that your value of $15,000 is exclusive of the feldspar deposit and the feldspar mill? *A.* Yes, sir.

Q. Now, Mr. Knapp, assuming that along the line of

196 Mr. Pine's land the flow of the Byram river is decreased by the construction and use of the dam at the State line by the City of New York by one-quarter or one-third, does the depreciation of Mr. Pine's property in your opinion amount to more than $2,000?

Objected to as incompetent, immaterial and improper, not the best method of arriving at the difference in the market value of the property in question.

A. Yes, sir.

Q. Have you lived all your life in the vicinity of this Byram river? *A.* Well, with the exception of perhaps eight or ten years.

197 *Q.* What part of your life was that? *A.* Well, a period of twenty-five years ago, when I was living in New York City.

Q. You lived, then, away from it in the City of New York for eight or ten years? *A.* About eight years; yes.

Q. Now, you were raised on the East Branch of the Byram river? *A.* Yes; on my father's farm.

Q. And you stayed there until you were what age? *A.* Until I was twenty.

Q. Now, won't you give us the rest of your residence, right down? *A.* I was then in the employ of H. B. Claflin & Co., here in this city.

Q. About what age? *A.* At about twenty-five or
198 six years of age; previous to that time I was with Lord & Taylor.

Q. Does that all make up the eight years that you were away? *A.* Yes, sir; and with various other companies here in New York.

Q. Did the total of your absence make up more than eight years? *A.* No, sir.

Q. Then where did you go? *A.* I went in business for myself in Greenwich, Conn., and I was there ten years in the retail dry goods business; there are two years of my life that I was in the State of Minnesota, at Winona; I stayed there between two and three

years in the drygoods business, and then removed to 199
Portchester, where I have been ever since; that is about twelve or fifteen years ago.

Q. What business did you take up in Portchester then? *A.* I was there ten years in the drygoods business again, and then I sold out my drygoods business and took up real estate.

Q. And in that you have continued since? *A.* Yes.

Q. And are now engaged? *A.* Yes, sir.

Cross-examined (by Defendant's Counsel):

By Mr. DYKMAN:

Q. You were asked a few moments ago what sales 200
you knew of by common report; you were reading from a memorandum book, and asked the plaintiff's attorney if he desired to know the libers and pages of the transfers. Those were copies, were they not, from the Greenwich Town Clerk's office? *A.* Yes, sir.

Q. Why did you make those copies if you knew of them before you went there? *A.* Because I supposed they would be authoritative, and I could answer the question——

Q. Didn't you know of them before you went there? *A.* I knew of the transfer, but I couldn't get at the price because ——

Q. What knowledge had you of the price other than what you read after you reached Greenwich? *A.* 201
From consultation with the attorney in the transaction?

Q. And you copied those records? *A.* Yes, sir.

Q. Now, you spoke of King street—of some handsome places on King street—how far is King street from the property in question where these handsome places are? *A.* Well, I should suppose a mile and a half or a mile—half a mile, some of them. Anywhere from half a mile to a mile and a half; all along there, for several miles along King street.

202 *Q.* You did not consider the mill on the property in question? *A.* No, sir.

Q. Or the feldspar? *A.* No, sir.

Q. You did testify, however, that there would be a reduction, did you not, if one-quarter or one-half of the water was taken away; have you so testified? *A.* Reduction on what?

Q. Reduction in the value of the property? *A.* Oh, yes; I thought it would be affected by the taking of the water.

Q. To what extent? *A.* Well, the figures I have on it are about thirty per cent. of the value of the property.

Q. Thirty per cent? *A.* Yes.

203 *Q.* How did you arrive at thirty—why wasn't it fifty or why wasn't it ten? *A.* For the reason that if I were going to buy the property as a place of residence, or if I were going to attempt to sell it, I should consider that in a time of drought that the place would be deteriorated to that extent; that is my judgment.

Q. Assuming that prior to the City of New York taking any action in this matter, Russell, Birdsall & Ward, Tingue, House & Co., and other owners of water rights, had purchased land at the head waters of the stream, had built a dam, had operated that dam and detained the flow for over sixteen years, their action in depriving this farm of water would be equally as detrimental, would it not, as the action of the City?

204

Objected to upon the ground that the question assumes facts that have not been proven, and that it assumes a fact which is directly the reverse of what has been proven, to wit, that these people never did divert the water from the channel of the Byram river, but that after they used the water—if they used the same—it continued to flow down the channel of the Byram river.

A. I shouldn't regard the action of these gentlemen 205
referred to in damming up the Byram Pond as being injurious to Mr. Pine's property, for the reason that they maintained the flow of water there at the very time of the year when the river bed is normally the driest, and it would be rather a benefit than a damage.

Q. Then they benefited the property? *A.* They didn't injure it any.

Q. Did they benefit it? *A.* I couldn't testify that it would be a positive benefit to it.

Q. Was it a benefit or a damage to its market value? *A.* Well, my judgment is, it was no damage to the property.

Q. It was not a damage to the market value of the property? *A.* No, sir. 206

Q. That you are sure about? *A.* Yes, sir.

Q. Were you in the real estate business when they built the dam? *A.* No, sir.

Q. You have never bought or sold a farm in the neighborhood in your life, have you? *A.* No, sir.

Q. Don't own any? *A.* No farm.

Q. What is the nearest farm to this property that you own? *A.* Well, I had an interest in my father's farm, but I didn't own it, of course.

Q. You never bought or sold any farm? *A.* No, sir.

Q. You have never had occasion to sell a farm from which one-quarter or one-half of a stream was diverted, have you? *A.* No, sir.

Q. One-quarter of the waters of Byram river and 207
Byram Pond would supply all the cattle on this property with water, would it not? *A.* In ordinary seasons of the year it would.

Q. As a rule? *A.* As a rule.

Q. Is there any mill-pond on this property? *A.* No pond; no, sir.

Q. How many acres are there in this place? *A.* 106.

Q. How many feet frontage on the river? *A.* It is 3,725 feet.

208 *Q.* Both sides? *A.* That takes both sides; I understand—no, not both sides, because Mr. Williams has an interest on the other side; so it is all on one side.

Q. So that the plaintiff Pine in this action only owns one side of the stream? *A.* Yes.

Q. How was the market value of his property decreased, if there is water enough left for cattle, assuming he has no right to build his dam across the stream or hold the water for a moment, the plaintiff Pine owning the land on one side of the river only? *A.* Will you allow me to answer that question in my own way?

The COMMISSIONER—Answer the question as you
209 think it should be answered.

Question repeated.

A. I have already stated that the flow of the eastern branch is nearly as large, in my judgment, as the flow of the western branch; Mr. Pine, in the event of the eastern branch being taken, would be almost absolutely destitute of water there, in my judgment, in a very dry time.

Q. Now, then, assume that the City of New York has not taken the waters of the East Branch, and has not interfered with them, and has only taken or intends to take the head waters of the Byram to the extent that Mr. Marshall said, of a quarter or a half, and there is still water enough there for cattle, how do you ac-
210 count for the difference in the property; leave the East Branch out entirely? *A.* During the extremely dry periods the stream will be so diminished there that to a certain extent it would be, or perhaps might become, a menace to the public health; it might injure the immediate surroundings of the place.

Q. And it might not; is that correct? *A.* Yes; there is a possibility there.

Q. Now, we have the element of the public health; what other elements have you; leave the East Branch out entirely? *A.* Well, if you diminish the flow of a stream of water in front of a man's place,

where the stream is the feature of the place, as is the case of Mr. Pine's, he having over 3,000 feet frontage, you certainly damage the property in my judgment. 211

Q. In what way? *A.* Well, you detract from its attractiveness.

Q. If there is water enough to water cattle? *A.* Well, that isn't the main consideration.

Q. How far is Mr. Pine's residence from the brook? *A.* I suppose 100 feet.

Q. How wide is the river? *A.* About 25 feet at that point.

Q. That is below the point where the East Branch strikes the Main Branch? *A.* Yes, sir.

Q. How far from the point where the East and the Main Branch of the Byram meet each other is the Pine residence? *A.* I really don't know; I should suppose it is a mile and a half or two miles; I am not positive as to the distance. 212

Q. Now, what actual effect on the market value of the property, other than imaginary, to look at, does this diversion have—what practical effect?

Objected to upon the ground that the witness has answered that question several times.

A. Well, what do you mean by practical?

Q. Practical effect upon the market value, other than the ones you imagine, that one man might want to see a stream. I mean the practical use and occupation of the property, how is it affected? 213

Same objection, that the witness has definitely answered that question several times.

A. As a matter of practical utility, Mr. Pine has water power there; he has a fall of—the map will show what—but sufficient to drive machinery, and that is an element with which I can't deal.

Q. Have you dealt with that element in giving your opinion? *A.* No, sir; not at all.

Q. Now, deal with your own opinion; how does this diversion affect the practical use of the property,

214 as you have considered it? *A.* For farming purposes, you mean?

Q. I mean for any purpose you have taken into consideration? *A.* Well, it affects this in this way that it reduces the water supply of the place.

Q. Outside of the mill, which you did not consider, how would that practical use affect it, if there is water enough there for cattle? *A.* Well, for farming purposes, anything that would detract from the flow of water on a place is always liable to cause a deterioration in the value of the property.

Q. What do you use the water for there outside of the mill, which you haven't considered? *A.* Well, it is used for domestic purposes partially.

215 *Q.* And if there is enough there for that domestic use? *A.* Well, that is one of the points I am not clear on.

Q. Assuming the statement made by the plaintiff's attorney to be true, that it is decreased in flow from one-half to three-quarters, there would be still water enough there for cattle to drink? *A.* I suppose that might be so.

Q. Aren't you sure it is so? *A.* I wouldn't be positive of it, if the Eastern Branch were taken away.

Q. Assuming that the Eastern Branch is not taken away in this litigation, you think there would be enough? *A.* The Eastern Branch would provide enough; yes, sir.

216 *Q.* Then assuming that the City of New York in no way up to present time has interfered with the Eastern Branch, there would be enough water there for ordinary domestic and household uses? *A.* From that source, yes, sir.

Q. No matter from what source, there would still be water enough there? *A.* Yes, sir.

Q. Then we now have the place supplied with sufficient amount of water for ordinary household and domestic use, assuming that the city does not

take the Eastern Branch. What other element of damage enters into it, in your consideration? 217

Objected to, that the witness has already answered it several times.

A. There is no other element of damage except the diminished water; there is no element of damage there that I have to do with except the diminished flow of water.

Q. That diminished flow of water relates to what, other than the ordinary household and domestic use? *A.* So far as any consideration I have entertained of it, it has no other application.

Re-direct (by Complainant's Counsel): 218

By Mr. MARSHALL:

Q. You were present this afternoon when Mr. Birdsall testified that the diminished flow there could be as much as about 8,000,000 gallons per day, were you not? *A.* Yes, sir.

Q. Now, when I asked whether the damage to Mr. Pine's farm is more than $2,000, by reason of this diversion, and you tell me it is, do you mean that in the diminished flow of water flowing down the channel of the Byram river there is a loss of more than $2,000 to that farm?

Objected to on the ground that it is putting the witness in the place of the Court, and on the further ground that the witness has already answered the question. 219

A. Yes, sir; I do.

Q. What do you mean by the damage done to Mr. Pine's farm? *A.* I mean the decrease in the flow of the water in time of drought—or during the whole year for that matter.

Q. The decrease in the flow of water? *A.* The damage that would come to Mr. Pine's property comes through the diminished flow of the stream.

Q. When Mr. Dykman asked you the distance of Mr.

220 Pine's house from the "brook" did you understand him by the brook to mean the river? *A.* Yes, sir.

Q. In your opinion a piece of land like Mr. Pine's, with a natural flow along it of 24,000,000 gallons a day, is more valuable than if the flow were reduced 50 per cent., 33⅓ per cent. or 25 per cent.? *A.* Yes, sir.

Q. You regard a large flow of water as more valuable than a small flow? *A.* Yes, sir.

Re-cross:

By DEFENDANT'S COUNSEL:

Q. Will you please tell me why a piece of property
221 is worth more with this river, we will assume, five feet deep than five feet and an inch deep; what is the practical difference; you have already said if there was water enough there for ordinary household and domestic use there would be no difference in the market value of the property; you have eliminated the value of the water power?

Objected to upon the ground that it is a double-headed question, and that it assumes facts not proven to exist, and which couldn't by any means exist, a difference of one inch on a flow of five feet, and therefore incompetent, irrelevant and immaterial.

A. On the same principle that I would regard a large
222 full flowing stream through my property of infinitely more value than I would an open ditch.

Q. If there was water enough to satisfy all ordinary household and domestic uses, and there was no mill upon the property, how could a slight difference in the quantity of water affect the value of the property?

Objected to upon the ground that a fact is assumed that has not been proven, and which is directly the reverse of what has been proven, that the decrease is 33⅓ per cent.

A. If the statement of the Chief Engineer—— 223

Mr. DYKMAN—I want an answer to my question.

Q. (Repeated.) *A.* I do not regard the difference as slight.

Q. Assume it to be one-third, and still that there is water enough for all ordinary household and domestic uses, how could it affect the market value of the property? *A.* For the reason I have already stated, that the river is the feature of Mr. Pine's property, preeminently so, and when you have once destroyed that feature of his property you have affected the value of that property very materially.

Q. Have you ever seen it destroyed; ever seen it dry? *A.* No; I have not. 224

Q. Are you interested in any property on the Byram river?

Objected to as already answered.

A. No; I have no interest there, not directly, on the Byram river.

Q. Indirectly? *A.* No, sir; I own a brick block in Portchester, but that isn't on the Byram river; Portchester is on the river, but my property isn't.

EDWIN A. KNAPP.

Subscribed before me }
March 20, 1900. }

225

JAMES A. RENWICK,
U. S. Examiner.

Adjourned to Friday, May 12, 1899, at 10 A. M.

226

SAMUEL PINE and another

against

THE MAYOR, ETC., OF NEW YORK.

NEW YORK, May 12, 1899.

Met pursuant to adjournment.

Present—The Commissioner, Mr. WILLIAMS.

A telegram is received from Mr. Dykman stating
227 that he is unable to be present.

Further hearing adjourned until further notice.

NEW YORK, June 28, 1899.

Met pursuant to notice.

Present—The Commissioner, Mr. WILLIAMS.

On account of the absence of the witness, the hear-
228 ing is adjourned until the forenoon, at 1.30 P. M. of this date.

JUNE 28, 1899, 1 P. M.

The witnesses being unable to attend, the hearing is adjourned until July 12, 1899, at 10.30 A. M.

NEW YORK, July 12, 1899. 229

Further testimony for complainants, taken before JAMES A. RENWICK, Esq., Examiner.

Appearances—Mr. WILLIAMS, for complainants (Mr. MARSHALL, of counsel); Mr. HENRY T. DYKMAN, for defendants.

DANIEL M. GRIFFIN, being duly sworn and examined as a witness for the complainants, testifies:

Direct examination:

By Mr. MARSHALL:

Q. Where do you live? *A.* Portchester, New York. 230

Q. Do you own property on the West Branch of the Byram river? *A.* Yes, sir.

Q. Will you state its general locality? Describe the locality of your property.

Objected to as incompetent, what he owns, and immaterial and improper, and on the further ground that the property owned by the witness is not the subject of this litigation and has no reference to it.

Q. Describe the locality of your property in reference to the dam built by the City of New York, and in reference to the junction of the East and West Branches of the Byram river. 231

Same objection, and on the further ground that the locality of the property owned by the witness can have no effect upon the Pine property.

A. It is on the State line; I don't know how I can describe it better than that.

Q. Describe the location of your property in reference to it, how far from the city dam? *A.* I never measured it.

232 *Q.* About how far?

Same objection.

A. Two hundred yards perhaps.

Q. Now, how far are you from the junction of the East and West Branches of the Byram river?

Same objection, as immaterial.

A. I should say in the neighborhood of four and one-half to five miles.

Q. How large is your ownership there, in acres?

Objected to as incompetent, improper and immaterial.

A. Two hundred and ninety (290) acres.

233 *Q.* Explain how that farm lies along the West Branch of the Byram river; is it all on one side?

Mr. DYKMAN—It is not material. I will admit now that he owns some property on the Byram river, if he says he does. I know his father did.

A. No.

Q. How does it lie? *A.* They strike together on corners, as I might say; one is on one side and the other on the other, and the corners meet.

Same objection.

Q. You are speaking of two farms? *A.* Yes, two farms, and the river separates them both.

Q. How far are these farms from the land of Mr.
234 Pine, the plaintiff in this action, the Pine farm? *A.* If you mean the same Pine you spoke of, four and one-half or five miles.

Q. And how far from the land of Frederick Muller? *A.* I don't know where Muller's land is.

Q. Your land doesn't lie on the East Branch nor touch the East Branch of the Byram river? *A.* No, sir.

Q. Dr. Griffin, will you give us a statement as to how many years you have lived on this property of yours, on the West Branch of the Byram river?

Same general objection, as incompetent, improper and immaterial.

A. Until I was twenty-one. 235

Q. Were you born there? *A.* Yes.

Q. And you have lived near there, in that section, since you were twenty-one? *A.* No.

Q. Where have you lived? *A.* On the Harlem Railroad, Pleasantville; since then, in Portchester.

Q. Have you been in the habit of visiting this property; your property on the Byram river?

Objected to on the ground that the property owned by the witness, or claimed to be owned by him, is not the subject of this litigation.

A. Yes.

Q. How frequent? *A.* Sometimes once a year, and some years every month. 236

Q. Now can you describe to us how, prior to the construction of the dam by the City of New York, you found the flow of water in the West Branch of the Byram river? *A.* There was a running stream.

Q. Do you know whether the character of that stream has been changed—whether the character of its flow, as to the water, has changed since the construction of the dam by the City of New York; I ask you whether you know?

Objected to on the ground that the point in the river is not fixed, the property in question being immediately below the East Branch of the Byram river.

A. Yes. 237

Q. Have you visited those farms since the construction of the dam by the City of New York? *A.* I did.

Q. And you have examined the channel of the river through your property since the construction of the dam by the City of New York? *A.* I did.

Q. Now, will you state when you examined it? *A.* Middle of last August.

Q. And state what you found? *A.* Dry stream; no stream.

Same objection.

238 *Q.* Have you ever found that stream dry prior to the construction of the dam by the City of New York.

Same objection, and the further objection on the ground that the witness is now relating a state of affairs as existing on property five miles above the property in question and above the East Branch of the Byram river, the property referred to by the witness not being the subject of this litigation.

A. No.

Q. Dr. Griffin, do you know of a swamp in or about this city dam, the Tamarack swamp? *A.* The Tamarack swamp is nowheres near the dam.

239 *Q.* Do you know of a swamp in or about the dam? *A.* Yes.

Q. Is the pond constructed in a swamp or not? *A.* Yes.

Q. Is it dug out of the swamp? *A.* Yes.

Cross-examined by Mr. DYKMAN:

Q. Do you know of a river called the East Branch of the Byram river? *A.* I know of it, yes.

Q. Do you know where the Pine property is? *A.* Yes.

Q. Tell me where it is, please; who bounds it on the north and on the south? *A.* I couldn't; I am not
240 familiar enough with it.

Q. You are not sufficiently familiar with the property which is the subject of this litigation to tell who adjoins it on the north or on the south? *A.* I couldn't; I drive by it once in a while but I am not familiar with the neighborhood.

Q. How long is it since you have seen it? *A.* I haven't been by that property in at least a month.

Q. When you were by it, did you drive there? *A.* *A.* Yes.

Q. Could you see all the Byram river through the

Pine property, when you were driving by? *A.* Why, 241
yes; if I looked, I suppose.

Q. Did you look? *A.* I didn't pay any attention; no, sir.

Q. Now, tell me the last time that you paid any attention to the Byram river running through the Pine property? *A.* I never paid any attention to it at all down there.

Q. Now, the property that you speak of, where there was no live stream, was the property owned by Daniel M. Griffin years ago? *A.* Yes.

Q. About the State line? *A.* Yes, sir.

Q. And below the point to which you have made reference there are streams running into the Byram river, are there not? *A.* None that I know of, until 242
you strike the other branch of the river.

Q. The general drainage area of the entire country flows in, does it not? *A.* Well, yes; I presume it does.

Q. Do you presume so, or do you know? *A.* It must necessarily.

Q. Do you own what we commonly term the Daniel M. Griffin farm? *A.* Yes.

Q. And you are a claimant against the City, are you not, for damages caused by the diversion of those waters? *A.* Yes, sir.

Q. And as such claimant, you, of course, have studied this situation?

Mr. MARSHALL—What situation? 243

Q. The situation of commencing actions against the City or presenting claims against them for damages? *A.* I want damages for taking all the water I have got.

Q. And you have consulted with the counsel in relation to those claims, have you not? *A.* I don't know what you would call a consultation.

Q. Talking to a lawyer, to be more explicit? *A.* Well, the lawyer talked to me.

Q. Will you please answer my question; have

244 you or have you not talked to a lawyer in relation——
A. Yes, I have talked to a lawyer with relation to it.

Q. In relation to these claims—this claim that you have or claim to have against the City, is that correct? *A.* Yes, sir.

Q. Who was that attorney? *A.* Mr. Williams has the contracts.

Q. Mr. Williams, the attorney for the plaintiffs in this action, has a contract with you in relation to your claim against the City for damages to what I term the Daniel M. Griffin farm on the Byram river, is that correct? *A.* He was to collect for a certain percentage.

Q. I am not asking you that; I say, he has a contract with you to collect damages against the City, is that
245 correct? *A.* Yes, sir.

Q. Damages which you claim the City has caused your farm by diverting these waters? *A.* Yes.

Q. Do you remember the construction of the dam by Tingue, House & Co., Reynolds & Russell, Birdsall & Ward? *A.* I remember hearing of it, that is all.

Q. How old are you, please? *A.* Thirty-two, nearly thirty-three.

Q. You have stated that the stream below the reservoir was dry; in making that statement you refer, do you not, to the stream running through the Daniel M. Griffin property? *A.* Yes, sir.

Q. You don't say it was dry in running through the Pine property? *A.* I don't know anything about that.

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Re-direct (by Counsel for Complainants):

By Mr. MARSHALL:

Q. Have you any agreement at present with Mr. Williams? *A.* Not since the 1st day of July; my mother hasn't been here to sign the papers.

Q. There is no contract then at present between you and Mr. Williams or any other counsel in this action? *A.* Not at the present time.

Re-cross: 247

By Mr. DYKMAN:

Q. You say you have no agreement, either verbal or in writing, with any attorney in the world in relation to your claim against the City? *A.* At the present time, no, sir.

Q. Never signed any papers? *A.* No, sir.

Q. Never had any conversation with any attorney wherein you stated the amount you would give him, or any percentage? *A.* No, sir; not since the expiration of that date.

Q. I beg your pardon; I mean any time during your life? 248

Objected to.

A. Yes, I did, which expired the first day of July, with Mr. Williams.

Q. How long did that agreement continue in force which expired the first day of July? *A.* I think for two or three months; I forget the first.

Q. It was in force two or three month? *A.* Yes, sir.

Q. Is it not the fact that since that time that it has been a general understanding with you and the people owning the property that the agreement would be renewed, or that a new agreement would be made?

Complainants' counsel object to this entire line of examination as incompetent, irrelevant and immaterial; the witness has testified there is no contract or agreement of any kind in existence between him and any of the counsel in this action. He is now asked whether there is a general understanding. It is simply a reiteration of the same question, and he has answered it. 249

A. Not definitely stated; I don't know that there was.

Q. Please tell me what took place between you and

250 your attorney after the expiration of the agreement to which you have referred?

Objected to as immaterial, irrelevant and incompetent, and upon the further ground that the witness is not obliged to state what passes between himself and counsel. Complainant's counsel advises the witness to refuse to answer that question.

Q. Do you decline to answer, Dr. Griffin? *A.* I am advised not to; I decline to answer.

Q. Do you decline to answer this question on the ground that it will tend to incriminate you in any way? *A.* No.

251 *Q.* Have you filed a claim against the City of New York for your damages to your property? *A.* I believe Mr. Williams did.

Q. You believe he did; when was that done, or about when? *A.* I can't remember the date.

Q. Do you remember the year? *A.* It was last year, I think.

Q. In 1898? *A.* I believe it was, if I am not mistaken.

Q. And at the time of the filing of that claim you had an agreement with Mr. Williams as your attorney in relation to the recovery, did you not? *A.* Yes, sir.

Q. Was that agreement in writing or a verbal agreement? *A.* The agreement was in writing.

252 *Q.* Where is that agreement? *A.* I possess one copy at my house.

Q. Can you tell me from memory when that agreement expired? *A.* No, I cannot.

Q. Can you approximate the date? *A.* It was extended; I cannot remember really.

Q. Can you approximate it within six months? *A.* September or October.

Q. After the expiration of the agreement which as you approximate it, was September or October, 1898,

did you take any further steps toward protecting your 253
claim? *A.* The agreement was renewed.

Q. Verbally or in writing? *A.* In writing.

Q. And when did the renewal expire, if at all? *A.* I can't give you the date of that; there was a renewal made which expired the first day of July, 1895.

Q. And was the renewal expiring in July, 1899, renewed? *A.* Not yet.

Q. Verbally or in writing? *A.* Neither way.

Q. And that agreement related to the claim of the owners of the property in question, known as the Griffin property for damages against the City, caused by the diversion of the water of the Byram river? *A.* Yes, sir; that is right, caused by the diversion of 254
the waters.

Q. Did you know, or do you know, the construction of the dam at Byram Pond by Russell, Birdsall & Ward, Tingue, House & Co., Reynolds and others? *A.* I have heard of it; as I say, I was too young then to take much interest in it.

Q. As you grew older, did you not see the dam at Byram Pond? *A.* I don't know that I ever saw it, ever noticed it; you are not speaking of the reservoir there?

Q. I am speaking of the dam built by Russell, Birdsall & Ward, Tingue, House & Co., and Reynolds and others, at the foot of Byram Pond prior to the City of New York taking any action whatsoever? *A.* I don't know that I have seen the dam; I may never have 255
seen it.

Q. Take your own farm, Mr. Griffin, the waters of the Byram river flowed through it prior as you say to the construction by the City of New York of this reservoir in the swamp? *A.* Flowed through it, yes, sir.

Q. Nothing flows now, except any surplus water that may go over it? *A.* Last time I saw it it didn't.

Q. As a general principle, nothing flows over the dam

256 now, except the surplus water? *A.* There was no surplus there, except in the wet season.

Q. I mean as a general rule? *A.* I haven't seen the dam lately; I can't answer the question as to the present time.

Q How often have you seen it? *A.* I have never been up there but once, and then I went all around it.

Q. Was the water backed back then? *A.* It was running through your reservoir, but not over the dam, positively not.

By Mr. MARSHALL:

Q. I understood you to say, did you not, that there
257 is no contract now between yourself and any attorney in respect to your claim against the City of New York? *A.* At present none; no, sir.

By Mr. DYKMAN:

Q. This contract expired July of this year? *A.* Yes, sir.

Q. When were you first asked to appear here as a witness in the Pine case? *A.* I could tell you that by looking up my letters; I don't remember the exact date.

Q. Three or four weeks ago? *A.* It must have been.

Q. Your contract hadn't expired then? *A.* Probably
258 not when I first got the notice to come here.

Q. And at the time when you were first advised that you would be wanted here as a witness in this Pine case? *A.* I don't think it was.

Q. Were you subpœnaed, and your fees regularly paid? *A.* No, sir; I was not subpœnaed.

Q. You came here voluntarily at the request of Mr. Williams, or this firm? *A.* Yes, sir.

Q. At a time when you had a contract with this firm in relation to your claim for damages against the City of New York? *A.* The first request I had was before the contract had expired.

Mr. MARSHALL—The counsel for the complainants in 259
this action desire to have it appear on the record that it was admitted by them that they are now considering and consulting with the witness in respect to his claim against the City of New York.

Mr. DYKMAN—I object to any statement being placed upon the record by the counsel for the complainants.

April 2, 1900.

DANIEL M. GRIFFIN,
By JAMES A. RENWICK,
U. S. Examiner.

LAWRENCE B. JENCKES, being duly sworn and examined 260
as a witness for the complainants, testifies:

By Mr. MARSHALL:

Q. Mr. Jenckes, where do you live? *A.* I live in Stamford, Connecticut.

Q. And what is your present occupation or business? *A.* I am Superintendent of Public Works for the City of Stamford.

Q. What is your profession or business? *A.* Civil engineer.

Q. When did you begin to be a civil engineer? *A.* I graduated from the Sheffield Scientific School, Yale College, in 1887.

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Mr. DYKMAN—I will admit he is a competent civil engineer in good standing.

Q. You hold a degree? *A.* I do not hold the degree of civil engineer; I hold the degree of Bachelor of Science, Ph. B.

Q. Mr. Jenckes, have you visited certain property on the main Byram river, referred to in the complaint in this action of Pine and Muller against the Mayor, etc., of the City of New York, and owned by Mr. Pine? *A.* I visited Mr. Pine's property.

262 *Q.* When? *A.* On the 26th of May, I think it was; I made a little note of it at the time (referring to book), 25th of May.

Q. Did you make any examination of the water rights or privileges of his property in respect to the Byram river? *A.* Yes, sir.

Q. Will you state generally what you found?

Mr. DYKMAN—Objected to unless the witness confines himself to the property lying on one side of the river only, owned by Mr. Pine.

Mr. MARSHALL—We confine the question to Mr. Pine's property, which does lie on one side of the river only.

263 *Q.* I add to the question the statement that it is in evidence that Mr. Pine's property does lie on one side of the Byram river only; that you understand, Mr. Jenckes? *A.* I understand that; yes, sir.

Q. (Repeated) Will you state generally what you found, confining the question to Mr. Pine's property, which lies on one side of the river only? *A.* I found at the lower end alongside of Mr. Pine's land—I found at the lower end of his land, a pond held back by a dam, about 13 feet high, and at the head of that pond the Byram river flows through a rather steep valley, where a dam could be erected——

Mr. DYKMAN—I move to eliminate from the testimony of the witness anything that could be done. We have
264 it admitted that he owns one side of the river. What he found, that is the question.

Mr. MARSHALL—I want to state in behalf of the plaintiffs in this case that they will later connect whatever testimony may be taken on this line by reading in evidence or offering in evidence the general statutes of Connecticut relating to pond rights and the right to dam running streams in the State of Connecticut, as between owners owning opposite each other on a stream. We are not prepared to offer that statute this morning.

A. (Continued) Well, proceeding further up the

stream I found—I would like to ask a question, if I might, if you intended to include anything but the stream in the question that you asked me; just what I found on the stream itself, without regard to any other property of Mr. Pine? 265

Q. What you found on the stream itself, along Mr. Pine's land? *A.* Well, I think that is all I found in regard to the stream.

Q. Above this valley, through which you say the stream flows, you found the stream, I presume? *A.* Yes, sir.

Q. About how wide; what did you find there; what sort of a stream? *A.* A running brook, running quite rapidly, varying in width—the bed of the stream varying in width from five to fifteen feet, I should say. 266

Q. Now, will you state from your examination of that valley, through which the stream runs—will you state as a civil engineer what could be done in respect to the erection of a dam?

Mr. DYKMAN—Objected to on the ground that it is a self-evident proposition that a dam could not be built on one side of a stream, the complaint in this action showing that the plaintiff only owns the land on one side of the stream in question, and that the question must be confined to the lands owned by the plaintiff.

Mr. MARSHALL—In answer to the objection, the plaintiff's counsel states that they are not limiting the question to what the plaintiffs in this action could do, but as to what this civil engineer, as a scientific man, found as a matter of scientific engineering could be done, eliminating the question of ownership? 267

Mr. DYKMAN—Then I object to it on the ground that the question of ownership cannot be eliminated.

A. A dam could be erected at this point with reasonable cost, which would throw the water back to the upper end of Mr. Pine's land.

268 *Q.* At which point do you mean? *A.* At the head of the pond at the lower end of Mr. Pine's land.

Q. Can you state what would be the height of that dam? *A.* About ten feet.

Q. Now, can you, as a civil engineer, state the value of the water-power that could be developed there by the dam, taking into consideration the fact that prior to the erection of the City's dam the flow down the Byram river averaged about 24,000,000 gallons per day?

Objected to.

Mr. DYKMAN—I ask leave to examine the witness as to his competency to testify to the value of any water-power on the Byram river.

269

By Mr. DYKMAN:

Q. What water-power have you bought or sold on the Byram river? *A.* None.

Q. What is the nearest water-power that you have bought or sold, either as an individual or as an agent? *A.* Never bought or sold any.

Q. What is the nearest water-power that you have rented, either as principal or agent, to the property in question? *A.* I never rented any.

Q. Then if you should be permitted to answer this question, your answer would be what, in your opinion, it would cost to reproduce this water-power by steam at the point in question? *A.* Yes, sir.

270

Mr. DYKMAN—I object to it on the ground that it is improper, immaterial and incompetent, to prove the cost to reproduce a thing in order to prove its value. I submit the witness is not competent to answer the question.

Q. Read?

Mr. DYKMAN—I ask the Commissioner to direct the witness to give a categorical answer. Can you state its value? That is the question.

A. I can make an estimate of the value.

Mr. DYKMAN—I move to strike out the answer on the ground that it is not responsive. He was asked if he could state the value. 271

By Mr. MARSHALL:

Q. Now, Mr. Jenckes, how wide is this so-called valley, at the lower end of which you state a dam could be erected? *A.* At the bed of the stream it is about 12 to 15 feet wide.

Q. And at the top of the banks, about? *A.* The top of the banks of the stream?

Q. I mean at the top of the banks on each side of this valley?

Objected to on the ground that the plaintiff does not own both sides of the stream; it is not the subject of this litigation. 272

A. I can't answer that question in regard to the width at the top of the banks.

Q. Does not the width at the top of the banks bear any relation whatever, in the question of water-power to the water-power developed; in other words, does the size of the pond created by the dam bear any relation to the question of water-power? *A.* Well, the top of the dam would relate, but the top of the bank is too indefinite.

Q. The size of a pond which results from a dam, does it bear no relation to the water-power?

Objected to on the ground that it is impossible to answer the question; there is no fall, area, width, height or flow given. 273

A. I don't think I can really answer the question in that form.

Q. Assuming the same height of dam in two ponds, one covering 100 acres, and one covering 5 acres—the same height of dam—is there any difference in the water-power developed?

Objected to on the ground that it is too remote; it is impossible to answer.

274 *A.* There would be a difference in value, yes.

Q. Well, what difference in value; what does it consist in? *A.* A pond covering 100 acres would give a more uniform power than one covering 5 acres, owing to the capacity for storage in the pond.

Q. Did you in your examination of this so-called valley at Mr. Pine's land reach any conclusion at all as to the size of the pond which would result from the construction of the dam to which you referred?

Objected to that no dam can be constructed unless you took in lands not owned by Pine.

A. In a general way; yes.

Q. Now, what size?

275

Same objection.

A. The pond maintained by a dam at the head waters of the pond at the lower end of Pine's land would be in the neighborhood of half a mile long and vary in width from 200 feet at the dam to the width of the bed of the stream at the upper end——

Q. How wide? *A.* Well, about 12 feet—and would be about 500 feet at the widest point.

Q. You have given, Mr. Jenckes, the width and length; you haven't mentioned the depth, I think.

Mr. DYKMAN—At what point?

A. The depth at the lower end where the dam
276 would be erected would be about 10 feet.

Q. Now, Mr. Jenckes, assuming the case of a river about 12 feet wide in which the average flow was 24,000,000 gallons a day, through a valley of a size which permitted, by the construction of a dam, a pond about half a mile long, about 200 feet wide at the dam, 12 feet wide at the upper end, being about 500 feet at its widest part, and having a depth at the dam of 10 feet, can you as a civil engineer, state from those facts the value of the water-power which could be developed at the dam, taken in connection with the cost of steam-power?

Mr. DYKMAN—I ask the Commissioner to direct the 277
witness to answer the question in relation to what value in dollars and cents.

A. No, sir; not with that information.

Q. Is there any way by which you, as a civil engineer, can estimate the value of water-power? *A.* I can make an estimate of its value; yes, sir.

Q. How do you do it? *A.* You require the quantity of water and the fall.

Q. The quantity of water you understand from the Byram river, to be 24,000,000 gallons of water per day, averaged throughout the year? *A.* Yes, sir.

Q. The fall at this dam to which you have referred, which you say can be constructed at the foot of the valley, is about 10 feet? *A.* Yes, sir. 278

Mr. DYKMAN—He didn't say that.

Q. What fall could you get at the dam? *A.* About 10 feet.

Q. Then in the question I have given you have the quantity of the water and the fall? *A.* No, sir; I beg pardon, that is not in the question I said I could not answer.

Mr. MARSHALL—I will add to the question, the fall at the dam being about 10 feet.

Question repeated.

Q. Now, Mr. Jenckes, assuming the case of a river about 12 feet wide, in which the average flow was 279
24,000,000 gallons per day, through a valley of a size which permitted, by the construction of a dam, a pond of about half a mile long, about 200 feet wide at the dam, 12 feet wide at the upper end, being about 500 feet at its widest part, and the fall at the dam being about 10 feet, can you, as a civil engineer, state from those facts the value of the water-power which could be developed at the dam, taken in connection with the cost of steam-power?

Mr. DYKMAN—I object to the question so far as it relates to its being taken in connection with the cost of steam-power.

280 Mr. MARSHALL—Strike out the words: "In connection with the cost of steam-power."

A. I can only make an estimate of the cost to reproduce it in steam.

Q. Could you state the horse-power that could be developed at such a dam? *A.* Yes, sir.

Q. Beginning with your graduation from the Sheffield School, will you kindly give us the history of your work as a civil engineer? *A.* January 1, 1888, I began work as assistant engineer on the water-works at New Rochelle; I remained there until the fall of that year, and then under the same man as principal had charge of construction of private water-works at
281 New Dorp, Staten Island, at Cranstons, N. Y., and at Rhinebeck, N. Y.; I then was employed by Vermeule & Bien, in the topographical survey of the Croton watershed for three months; I then made plans, estimates and specifications for a water-power plant at Rainbow on the Farmington river, near Hartford, Conn.; then I think in August of 1889, I was employed by Cheney Brothers of South Manchester, Conn., and had charge of all their construction and outside work, including the construction of the water-works for the City of South Manchester, repairs in their mills, new buildings and the sewerage system for the town, together with considerable work on the South Manchester Railroad; I then was employed by the New York,
282 New Haven and Hartford Railroad Company as draftsman and office assistant on the new four track work from Portchester to Glenbrook; I was then City Engineer of Stamford, Conn., for about seven months; at that time, in December, I think, 1896, I was employed as purchasing agent for the G. H. Hammond Company, of Hammond, Ind., buying all their supplies and machinery for their plant, and for the construction and operation of the Chicago, Hammond and Western Railroad Company, and some of the allied companies with the G. H. Hammond Company; on the 15th of May in

this year, I took the position of Superintendent of 283
Public Works at Stamford, which position I now hold.

Q. You referred to certain private water supplies that you had looked after at Cranstons and Rhinebeck; whose were those? *A.* At New Dorp, it was for the Vanderbilt tomb and property about it; at Cranstons it was for J. P. Morgan, and at Rhinebeck it was on Levi P. Morton's place.

Q. Can you give an idea of the magnitude of the water-power at those places, or the quantity of water used? *A.* At those three points it was very small; at Cranstons it was a small brook; at New Dorp it was a brick well, sunk near a stream, and at Rhinebeck it was a brick well, sunk near a stream.

Q. What was it at Manchester? *A.* At Manchester, 284
it was a dam on a small stream; in fact, we had several dams on different streams at Manchester.

Q. What flow of water did you develop there? *A.* We consumed about a million gallons a day, from the new reservoir that I built.

Q. Who were Vermeule & Bien? *A.* Civil engineers in the City of New York.

Q. Employed by the City of New York, were they? *A.* The details of their connection with the City of New York, I don't know.

Q. But you say the work that you did was in relation to the Croton watershed? *A.* Yes, sir.

Q. Now you tell us that as a civil engineer you could estimate the horse-power? *A.* Yes, sir. 285

Q. Having the facts that I stated to you in relation to a pond flowing through a valley? *A.* Yes, sir.

Q. State to us the water-power that could be developed under the facts stated to you?

Objected to unless the facts confine the witness to the land which is the subject of this litigation.

Q. (Repeated) Now, Mr. Jenckes, assuming the case of a river about 12 feet wide, in which the average

286 flow was 24,000,000 gallons per day, through a valley of a size which permitted, by the construction of a dam, a pond about half a mile long, about 200 feet wide at the dam, 12 feet wide at the upper end, being about 500 feet at its widest point, and the fall at the dam being about ten feet, can you as a civil engineer state from those facts the horse-power which could be developed at the dam, it being admitted that Mr. Pine only owns one side of the river? *A.* Yes, sir.

Q. Now, will you state the horse-power? *A.* About 40 horse-power—I beg pardon (referring to paper), 33 horse-power that should be.

Q. Now, is there known to the profession of civil engineering a value to such horse-power? *A.* No
287 definite value.

Q. Taking the cost to produce horse-power by steam, can you state relatively the value of such horse-power?

Mr. DYKMAN—A categorical answer, yes or no.

Question withdrawn.

Q. Is there a known figure of cost of the production of horse-power by steam?

Objected to as irrelevant, incompetent and immaterial.

A. It varies so at different points that I couldn't
288 give any definite answer.

Recess.

After recess.

By Mr. MARSHALL:

Q. Mr. Jenckes, did you find Mr. Pine utilizing any horse-power on that stream there? *A.* No, sir.

Q. Did you find any manufacturing business going on there? *A.* Yes, sir.

Q. Will you state what you found? *A.* He has a 289
mill on his premises.

Mr. DYKMAN—I object to the answer on the ground that the witness does not know where his property lines are. He saw a mill somewhere.

A. (Continued) There is a mill near Mr. Pine's house where feldspar, which is quarried in the vicinity, is crushed and ground.

Q. Did you go in that mill? *A.* Yes, sir.

Q. Did Mr. Pine go with you? *A.* I don't remember whether Mr. Pine himself went with us or not.

Q. Was he there on the premises when you visited his alleged premises that day. *A.* A man representing 290
himself to be Mr. Pine was there.

Q. How is that mill operated? *A.* By steam-power.

Q. Did you examine the mill and the steam plant? *A.* Yes.

Q. Did you examine the engines? *A.* I looked it over, yes, sir; I didn't examine it closely.

Q. Do you know what kind of an engine it is? *A.* I don't know the maker's name.

Q. Scientifically, do you know what it is? *A.* It is a plain, side-valve engine; that is the trade name for it.

Q. Now, Mr. Jenckes, have you made an estimate of the value of the estimated water-power which you testify might be developed by a dam across the little valley? 291

Objected to on the ground that the witness has already stated that he could not state its value, but could state the cost to reproduce it.

A. No.

Q. You have not made any estimate? *A.* Not of the value, no, sir.

Q. Have you made an estimate of the cost of reproducing the 33 odd horse-power there which you say could be determined from reproducing it in steam? *A.* Yes, sir.

292 *Q.* Now, what is your estimate?

Objected to as incompetent, improper and immaterial, the question not being one of reproduction, but of value, which the witness admits he is unable to state.

A. About $1,080 a year.

Q. Amplify that statement, Mr. Jenckes? *A.* It would cost to produce 33 and a fraction horse-power by steam in a similar plant to the one at present operated about $1,080 a year.

Q. You include in that the cost of the necessary plant? *A.* The interest on the plant is included.

Q. Then this $1,080 is simply the disbursement for
298 the running expenses, plus the interest on the capital invested in the plant? I want to analyze that figure? *A.* It is the cost of the disbursement, as you term it, plus the interest on the capital invested in the plant, and an allowance for depreciation in the plant.

Q. Now, will you give me the figures, if you have them there, of the cost of the plant upon which you calculate the interest?

Objected to as incompetent, improper and immaterial.

A. A plant of that character would cost about $22 per horse-power.

Q. And you say it would develop 33 horse-power?
294 *A.* What would develop 33 horse-power?

Q. Your steam plant would develop how much horse-power as calculated by you? *A.* The steam plant that cost $22? One horse-power; that is per horse-power.

Q. And the water-power you testified was 33 horse-power, didn't you, which was to be developed there by the use of the water over the dam? *A.* Yes.

Q. Now, to develop the 33 horse-power then would cost $666?

Mr. Dykman objects to all these questions.

A. To put in the steam plant to develop an equal 295
amount of horse-power?

Q. That is the question.

Objected to.

A. In that vicinity; about that.

Q. $666? *A.* Yes.

By Mr. WILLIAMS:

Q. Could you buy a boiler and steam engine for $666 to produce 33 horse-power?

Same objection.

A. Yes; I think so.

Q. Now, go on with your elements of what made up 296
this cost of $1,080 per year?

Same objection to all these questions.

A. The cost of the coal.

Q. What is the cost of the coal?

Same objection.

A. I estimated the cost of the coal there $4.50 a ton.

Q. And how many tons? *A.* Well, I didn't figure the actual tons; that is, I haven't shown it here; I figured it, but I haven't it at hand.

Q. What did you allow for a man to run the engine? 297

Same objection.

A. $8 per horse-power per year.

By Mr. MARSHALL:

Q. That enters into this figure of $1,080—that $8 per horse-power per year? *A.* Yes, sir.

Q. What part of the total is the $8 per horse-power per year? *A.* What proportion?

Q. Yes? *A.* About a fourth.

Q. What is your total allowance, then, for a man to

298 run the engine—the total; if it is $8 per horse-power per year, what is it for the entire horse-power to be developed?

Same objection.

A. Why, for 33 horse-power it would be $264.

Q. And that comes out of the $1.080? *A.* Yes, sir.

Q. Now, go and give me what else makes up the $1,080?

Same objection.

A. There was $20.25 per horse-power per year for coal.

299 *Q.* Won't you give us the total of that?

Same objection.

A. $668.25.

Q. Now, what is the next element?

Same objection.

A. There was $1.11 per horse-power per year for the interest on the plant.

Q. And what is the total of that? *A.* That would be $36.63.

Q. Is there any other item?

Same objection.

A. Yes, sir; there was $2.23 per horse-power per
300 year for the depreciation of the plant.

Q. What is the total? *A.* $73.59; and there was 50 cents per horse-power for oil and waste; figuring all those things out, that figures up $1,058; there were some fractions in there that I left off.

Q. Now, in your estimate, you funded that, didn't you? *A.* Yes, sir.

Q. And I want to know the figure at which you funded it? *A.* Five per cent.

Q. What is the total?

Same objection.

A. That was the 33 horse-power; slightly over $21,- 301
000.

Q. Did you make any deductions from that for any element whatever, from the $21,000? *A.* Yes, sir.

Q. Now, what? *A.* I made a deduction for the cost of developing the horse-power.

Q. What was it? *A.* It was about $5,000.

Q. You got a net result of what? *A.* About $16,000.

Q. This was assuming the cost of coal at $4.50 per ton? *A.* Yes, sir.

Q. Now, assuming that the flow in this hypothetical river is reduced from 24,000,000 gallons per day to 16,000,000 gallons per day, can you give us the same figures, allowing for that altered condition, of 16,000,000 instead of 24,000,000 gallons? *A.* Yes, sir; 302
it would be about $14,000, and the cost of the development about $4,000, making a net of about $10,000.

Same objection.

Q. And a net loss, under these hypothetical conditions, of what? *A.* Of $6,000.

Q. About $6,000? *A.* Yes, sir.

Q. Mr. Jenckes, can the water-power which you state can be developed at this point be transmitted?

Same objection.

A. Yes, sir.

303

Q. For what distance? *A.* Any reasonable distance.

Q. What is a reasonable distance? *A.* Oh, it could be transmitted—let's see, that is a small power—25 miles.

Q. With what loss in efficiency, if any? *A.* From ten to twenty-five per cent, according to the distance.

Q. Now, do I understand you that the location of this present manufacturing plant of Mr. Pine, where he manufactures by steam, would interfere at all with

304 the utilization of this water-power for any other manufacturing purpose?

Objected to as calling for a conclusion of the witness.

A. No.

Q. When you visited this locality on the 25th of May, did you make any examination of what is known as the West Branch of the Byram river? *A.* I went to the junction of the two branches.

Q. What did you find there in respect to the comparative flow? *A.* Well, there was a considerable volume of water coming down the East Branch and very little down the West Branch.

305 *Q.* Now, Mr. Jenckes, assuming the case of two rivers of substantially equal size in point of width and length, which meet each other at a given point, one of which flows through a swampy territory, or a marsh, and the other of which flows over the hard surface of the land: which, I want to ask you, is, from a standpoint of a civil engineer, regarded as the more valuable water supply?

Same objection.

A. Why, under the same conditions in regard to area of watershed, the one which was swampy would be preferable, in my opinion.

306 *Q.* And why? *A.* The swampy ground holds back the water during the wet seasons and would let it down, to some extent, during the dry seasons.

Q. Have you ever had any actual case where you have been able to make a comparison of two such streams, or streams approximating those conditions? *A.* Well, I call to mind two reservoirs which we had at South Manchester, where it was quite noticeable; the sides of one were steep and rocky, with no swamps, and the flow was very irregular; the other flowed through swampy land, with some springs, and the flow was much more constant.

Cross-examined by Mr. DYKMAN: 307

Q. Will you please tell me the last place where you, as a civil engineer, had occasion to replace water-power by steam-power? *A.* I never replaced it in actual construction.

Q. Were you ever connected as a chief engineer or assistant engineer where that thing was done? *A.* No, sir.

Q. Your testimony, as I understand here, is based entirely on the hypothetical average flow of a stream? *A.* Yes, sir.

Q. Please tell me any case known to the profession or from any book which you have read, which you recognize as an authority in your profession, where the 308
average flow of a stream was used as a basis in your profession, either for supplying power or water for domestic or household uses, the average flow of a stream from January to January; tell me the place? *A.* I cannot tell you the place.

Q. Whom do you recognize as an authority on such a question in your profession, of hydraulic or civil engineer, where water supplies power? *A.* You mean as an authority in books?

Q. Yes?

Objected to, on the ground that defendants' counsel has conceded that the witness is a qualified expert.

Q. Fanning? *A.* Fanning is an authority on that 309
subject; yes, sir.

Q. What other authorities do you recognize? *A.* I don't recall the names just now.

Q. What books have you read on the subject?

Same objection.

A. I have read parts of a great many.

Q. Name me one, besides Fanning, out of the great many you have read?

Same objection.

310 *A.* I couldn't name you one to-day.

Q. Can't name me one, out of the great many? *A.* No, sir.

Q. I assume also that in making your statements or calculations here to Mr. Marshall, that you have assumed that this owner had a right to build and maintain a dam across the Byram river and hold the waters back for the length that you have stated?

Objected to as incompetent, immaterial and irrelevant, and further that the witness has said upon his direct examination that he knew Mr. Pine—that he had been told that Mr. Pine did not own on the other side of the Byram river.

311 *A.* I know that he did not own on the other side; I have not assumed that.

Q. Have you assumed that there is any dam there at all; have you not assumed that there was a dam? *A.* In making the estimates, I have assumed that the dam was erected.

Q. And that that dam, regardless of ownership, had a right to stay there, otherwise the water could not be kept back? *A.* Yes, sir.

Q. That was your assumption, was it not? *A.* Yes, sir.

Q. And if it should turn out in this proceeding, or any other, that a dam could not be built there by this plaintiff alone across the river and the property covered
312 with water to the extent which you have mentioned, then your calculation would be erroneous, would it not, if the dam could only go one-half of the river? *A.* It would be impossible to build a dam over half the river.

Q. Then so far as your profession is concerned, with an ownership on one side of a stream, treating it entirely as separate and distinct from the other side, you could not develop any horse-power whatever from it? *A.* No, sir; you could not.

Q. You also assume, do you not, in making this calculation of the horse-power that could be devel-

oped there, that a dam could be kept there, and that 313
the person or persons owning that dam had the right to fill this pond, regardless of the ownership below, did you not? *A.* Yes, sir.

Q. And if they did not have the right, when the water was low, to stop the gates and shut them tight, and fill that pond, that would change your calculation, if they were obliged to let the natural flow go down the stream as it came to them? *A.* The natural flow would go through the appliances for creating the horse-power, and be put into the stream again.

Q. You have used the word "average," have you not? *A.* I don't think I have used the word.

Q. I mean in answering a hypothetical question? *A.* Yes, sir. 314

Q. 24,000,000 gallons a day? *A.* Yes, sir.

Q. Then in order to get that average, there must be times when the stream is greater and also less? *A.* In making those figures——

Q. I am taking the hypothetical questions put by Mr. Marshall. (Question repeated.) *A.* Why, yes.

Q. Now, then, in order to get this horse-power, you must have storage capacity, must you not? *A.* Some; yes, sir.

Q. In order to get that storage capacity, you must at some time shut the gates to a certain extent? *A.* Yes, sir.

Q. Then you are assuming, are you not, that the man operating the mill, or whatever you may call it, has the 315
legal right to shut that gate to a certain extent? *A.* Yes, sir.

Q. A perfect legal right; then if he did not own that legal title, and it was put to you as a hypothetical question that he, the owner, did not possess that right, your answer, of course, would be different? *A.* Yes, sir.

Q. You say you found a mill on this property? *A.* Yes, sir.

Q. How large? *A.* How large is the building?

Q. How large, yes; I mean the buildings in use?

316 *A.* It was in two parts, or more properly, three buildings, I should say; one building where the machinery was about 40 feet by 25.

Q. A new building? *A.* No, sir; not a new building.

Q. New machinery? *A.* No, sir; not new machinery.

Q. No water flowing by there? *A.* Flowing by the mill; the brook flows about 150 feet from it.

Q. How far from the brook in question, meaning the East Branch of the Byram and the brook formed by the natural drainage, was this mill? *A.* Why, it isn't on the East Branch of the Byram, as I understand it; the East Branch doesn't come there.

317 *Q.* The East Branch of the Byram river empties into the Byram above this property? *A.* Yes, sir.

Q. Take the Byram river; how far is the feldspar mill from the Byram river? *A.* About 150 feet.

Q. No water conducted to it, is there? *A.* Only in a pipe for the supply of the boilers, and so forth.

Q. The mill is not dependent upon the flow of the river for the purpose of creating power? *A.* Only the water for the boilers.

Q. How large a pipe is that? *A.* About 1½ or 2-inch pipe.

Q. Will a 2-inch pipe supply the water to the boilers? *A.* I think the suction of the pump was about two inches.

318 *Q.* You mean to say the suction of the donkey pump or small pump supplying the boilers was supplied by a 2-inch pipe? *A.* I didn't look at the suction pipe; about 2 inches.

Q. Did the 2-inch pipe go directly into the boiler? *A.* No, sir; it went to a pump.

Q. Then a donkey pump, or small pump, pumped the water from the 2-inch pipe into the boilers; is that right? *A.* Yes, sir.

Q. And that is the only use at the time you were there to which the waters of the Byram were put? *A.* Yes.

Q. What did you see on the stream itself, what

mills were there on the stream? *A.* None nearer than the 319
mill mentioned.

Q. Then, on the Pine property there is no mill directly on the Byram river? *A.* None nearer than the mill mentioned.

Q. None on the Byram river. *A.* Well, 150 feet.

Q. Is there any on the Bryam river? Please answer me, yes or no. *A.* There is none directly on the river, but it is about 150 feet from the river.

Q. I asked if there is any on the river. *A.* There is none directly on the river.

Q. There is a mill operated by steam 150 feet from the bank of the river? *A.* Yes.

Q. From which river runs a pipe about two inches in size used for the purpose of supplying the boilers? *A.* 320
Yes, sir.

Q. And that was in operation when you were there? *A.* No, sir.

Q. It wasn't? What was in operation? *A.* Nothing.

Q. No mill? *A.* It wasn't running when I was there.

Q. Did you make a calculation as to the fall through the Pine property of this stream, mathematically, by surveys? *A.* I had a survey made.

Q. Made under your direction? *A.* Yes, sir.

Q. What did you find the fall? *A.* 9.92 feet.

Q. You spoke about being employed by Vermeule & Bien, in making a topographical survey of the watershed of the Croton; do you mean to be understood as testifying that you had actually surveyed the Croton watershed? 321
A. Portions of it—yes, sir.

Q. What portions? *A.* I worked at Katonah.

Q. How long were you at Katonah? *A.* Only a few days in each place at a time.

Q. Name me the places? *A.* I was at Katonah; I was at Pine's Bridge; I was at Yorktown.

Q. Did you use any map in procuring your contour lines? *A.* The contour lines were on the map when they were sent to me.

Q. Wasn't it generally understood that the contour

322 lines were taken from the map made by William E. Worthy and Mr. Craven years ago?

Objected to as immaterial, irrelevant and incompetent.

A. I don't know about that.

Q. Well, you ran no contour lines through that country, did you? *A.* No, sir.

Q. You were not employed by the City in any capacity at that time?

Further objected to upon the ground that the other side have conceded the competency of this witness.

323 *A.* I was employed by Vermeule & Bien; I had no connection with the City of New York.

Q. Did you use the storage reservoir to which you have referred in making your calculations as to the horse-power? *A.* It would be probably needed through portions of each day.

Q. Did you make a calculation as to the number of gallons of water you could store there? *A.* No, sir.

Q. Wasn't it quite important to make such a calculation in order to ascertain what you could depend upon in times of drought? *A.* Well, I made a liberal allowance.

Q. Is it not necessary as an engineer to make that calculation, in calculating the horse-power? *A.* To make an accurate calculation, yes.

324 *Q.* You didn't make it, did you? *A.* No, sir.

Q. Did you make any calculation as to the evaporation of the water from the surface of the reservoir, the loss so far as ponding is concerned, in making your calculations of horse-power? *A.* No, sir.

Q. You started out, if I remember correctly, with a certain number of square miles and a certain number of gallons per day? *A.* I had nothing to do with the drainage area.

Q. You simply assumed that 24,000,000 gallons of water per day going through there? *A.* Yes, sir.

Q. What dam is there on the Pine property, that 325
you saw there? *A.* None on the Pine property.

Q. What dam is there on the Pine property, together with the property on the opposite side of the river, that you saw? *A.* There is a dam near the lower end of Mr. Pine's property; I don't know whether it is on his property or not.

Q. Did you ask anybody whether that dam was on the Pine property or not? *A.* No, sir; I did not.

Q. You can't tell now whether it was or was not? *A.* I cannot.

Q. Can you locate the dam that you saw, on the minutes here, so that we can locate it on a map or survey? *A.* It was a dam a little less than a quarter of a mile—considerably less than a quarter of a mile— 326
below the entrance to Mr. Pine's place.

Q. You have stated in your direct examination that you could not state the value of the power, but could tell Mr. Marshall the cost to reproduce it; that is correct? *A.* Yes, sir.

Q. You don't pretend to come here and state the market value of a water-power or mill-power on that river; that is to say, what it would bring in the market between private individuals? *A.* No, sir.

Q. Is it or is it not a fact that it might cost considerable money to develop the power in a region where there would be no market? *A.* Yes, sir.

Q. Do you know where the Housatonic river is? *A.* Yes. 327

Q. Do you know Lakeville, Connecticut? *A.* I have been there.

Q. When you were there did you notice that the waters of the Housatonic river were turned into a large canal constructed of stone masonry running a long distance for the purpose of furnishing a water-power for the railroad there?

Objected to on the ground that it is immaterial, irrelevant and incompetent.

A. I paid no attention to it; I don't think I noticed it.

328 *Q.* As an engineer, with the exception of the water necessary to be furnished for the boilers at this Feldspar mill, how would the deprivation of the water of the Byram river affect running the mill? *A.* It would not affect it, with the exception of the water for the boilers.

Re-direct examination:

By Mr. MARSHALL:

Q. You stated to Mr. Dykman that the actual fall as shown by the survey was 9.92 feet? *A.* Yes, sir.

Q. In the question that was put to you, the fall assumed was 10 feet; does the difference between the two falls, between 10 feet and 9.92 feet, alter materially
329 in any respect the figures you have testified to? *A.* No, sir; the difference between those two might be accounted for by unevenness in the bed of the brook where the level was taken.

Q. I also understood Mr. Dykman to refer to an assumption on your part of a regular flow of 24,000,000 gallons per day; you understood me to say an average flow, did you not, of 24,000,000 gallons per day? *A.* Yes, sir.

Q. Are there mills along the Byram river? *A.* Through the whole length; yes.

Q. Many of them; one, two, three or four? *A.* I know three.

Q. Where are they? *A.* There is Hawthorne Mill,
330 Tingue, House & Company and a bolt factory down below there, near the Byram river; I don't know whether they use water from the river or not; and there is a small mill just below the dam that I mentioned.

By Mr. WILLIAMS:

Q. Do you know whether there are any further up the river? *A.* Well, I saw none.

By Mr. MARSHALL:

Q. Are there manufacturing establishments at Portchester? *A.* I am not familiar with them.

Q. Are there any there? *A.* I couldn't say. 331

Q. You don't know of any manufacturing establishments at Portchester; I don't mean on the river; I will take any manufacturing establishment going on there?

Objected to.

Mr. DYKMAN—We will admit that three-quarters of a mile from the river there is a shirt factory run by steam.

A. I have seen a large factory near the depot at Portchester.

Q. Then there are manufacturing industries at Portchester? *A.* Yes, sir. 332

Re-cross examined:

By Mr. DYKMAN:

Q. And at New Rochelle and Pelham? *A.* Yes, sir.

Q. Assuming this pond to be full—that is, the reservoir which you have testified to—varying in width from 300 to 500 feet and 12 to 15 feet and a fall of 10 feet, if they should draw that 10 feet down it would decrease your head? *A.* Yes, sir.

Q. And the ratio of decrease of power is far greater than the ratio of decrease perpendicularly in the water that you draw from the pond, per foot? *A.* The power for an equal amount of water is proportionate.

Q. I beg your pardon; you don't understand me. 333
Assume your pond is full? *A.* Yes, sir.

Q. You draw a foot of water off the surface? *A.* Yes, sir.

Q. Now, the ratio of decrease in drawing that water per gallon, or per cubic foot, per second would be greater, would it not, so far as the loss of power was concerned, than the actual horizontal decrease in the water; in other words, you would lose more in drawing that first foot than you would in drawing the next foot, and so on; wouldn't there be a greater loss of power after you had drawn the first foot down;

334 would there be as much power in the second foot as there was in the first? *A.* Why, no, because there wouldn't be so much water in the second foot.

Q. Wouldn't the head have something to do with it? *A.* Independent of the quantity of water, the power is exactly proportionate to the head.

Q. Do you mean to tell me there is as much power between the 9 and the 8 foot mark as between the 10 and the 9 foot mark in that reservoir? *A.* No, sir.

Q. And there is less when you go from the 8-foot mark down to the 7-foot mark? *A.* Yes, sir.

Q. And still less in proportion when you go from the 6 to the 5? *A.* Yes, sir.

Q. Now, isn't the ratio of decrease in power greater
335 from the 6 down to the 5, in proportion, than it is from the 10 to the 9? *A.* Yes, sir.

By Mr. WILLIAMS:

Q. Mr. Jenckes, would it be possible, leaving aside the question how far you have to flow, to develop at the point you have suggested a dam might be put, a much larger amount of horse-power; of water-power?

Objected to, unless confined to the lands owned by the plaintiff.

A. With a larger storage reservoir, I think you could develop more power.

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Mr. DYKMAN—We will admit that.

Q. Is it practicable at that particular point to build a dam 15, 20 or 25 feet high, economically, to develop a greater amount of horse-power?

Objected to, unless confined to the lands of the plaintiff.

A. It is practicable; yes; it is possible; possible, that is better.

Q. Is the topography of the land such as to enable one 337
to do that, at that point, at the foot of the little valley to which you have referred? *A.* Yes.

Q. Then it would be, in your opinion, practicable to develop a considerable horse-power at the foot of that little valley you have referred to? *A.* I couldn't say as to the practicability of it, without looking into it further.

LAWRENCE B. JENCKES.

Subscribed before me }
March 20, 1900. }

JAMES A. RENWICK,
U. S. Examiner.

JULY 19, 1899.

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Further hearing adjourned to Wednesday, July 19, 1899, at 10.30 A. M.

Adjourned by request of the Examiner to a day to be fixed.

AUGUST 3, 1899.

Further testimony for complainants, taken before JAMES A. RENWICK, Esq., U. S. Examiner.

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Appearances—Mr. WILLIAMS for complainants; Mr. MARSHALL, of counsel; Mr. DYKMAN, for defendants.

NEWTON S. JOHNSON, called as a witness for the complainants, being first duly sworn, testified:

Direct examination:

By Mr. MARSHALL:

Q. Where do you live? *A.* Glenville, Conn.
Q. Whereabouts there? *A.* On Mr. Pine's place.

340 *Q.* Are you related to Mr. Pine? *A.* Yes, sir; Mr. Pine is my father-in-law.

Q. How long have you lived there? *A.* Seven years.

Q. What is your occupation there? *A.* Well, I look after the feldspar mill.

Q. What is the size of Mr. Pine's farm there? *A.* 106 acres.

Q. Does it lie along the Byram river? *A.* Yes, sir.

Q. What use do you make of the waters of the Byram river? *A.* Well, we use it for feeding the boiler and we also use it for household purposes, and our pasture lots lie on it.

Q. Just state the number of your pasture lots and how they lie. *A.* We have four pasture lots north of the
341 house, on the river, and two below.

Q. They lie on the river? *A.* On the river; yes, sir.

Q. There is a pond on Mr. Pine's property, is there not? *A.* Yes, sir.

Q. Part of his property is flowed over by a pond, is it not? *A.* Yes, sir.

Q. Does this pond lie entirely on his land? *A.* No, part of it lays on his property.

Q. How does the boundary line of his property run with reference to that pond? *A.* The boundary line runs through the pond.

Q. How long have you have you been carrying on the feldspar business there? *A.* Six years.

Q. Have the manufacturing buildings been erected
342 within that time? *A.* Yes, sir.

Q. Have you conducted that business yourself? *A.* I have.

Q. Now, is that business a profitable business?

Objected to by defendants' counsel as incompetent, improper and immaterial.

A. Yes, sir.

Q. It is at present a profitable business?

Same objection.

A. At present, yes, sir. 343

Q. How many head of stock do you keep on that farm? *A.* We have six head of horned cattle and five horses or six horses.

Q. Mr. Johnson, have you noticed any diminution in the flow of the Byram river along Mr. Pine's property in the six years you have been there? *A.* Yes, sir.

Q. Can you give us any idea of what you have noticed? *A.* Well, how do you mean?

Q. As I understand you, you say that you have noticed a diminution in the stream? *A.* But at different times.

Q. Now will you state the extent of it and what time? *A.* Well, I have seen it very nearly dry certain 344
times of the year; two years ago this month it was nearly dry, and even this last spring it was very low.

Q. Had you ever noticed any such diminution prior to two years ago? *A.* No, sir; not to any extent.

Cross-examined by Mr. DYKMAN:

Q. Have you seen the waters of the Byram river so low that cattle couldn't get enough to drink? *A.* No, sir.

Q. What other water is there on the farm of Mr. Pine besides the Byram river? *A.* In the very wet season from the swamp we have a little water that is not fit for cattle to drink.

345

Q. Have you any well on the property? *A.* Yes, sir.

Q. Make any use of that? *A.* Yes, sir.

Q. What use? *A.* Drinking water.

Q. Any water other than the well and the river? *A.* This swamp I speak of.

Q. Any springs? *A.* No, sir.

Q. How are the cattle watered in the winter? *A.* Last winter—well, nearly every winter we take and carry it from the river.

346 *Q.* You carry it from the river to the barn where the horses are? *A.* Yes, sir.

Q. How were your cattle watered during this extreme dry spell that you mentioned? *A.* We got water from the river.

Q. What connection has the river with the feldspar plant, other than furnishing water for the boilers? *A.* Nothing at all.

Q. How much water do you use a day for the boilers on the average? *A.* I am not prepared to answer that; we have an eighty-horse boiler?

Q. You can't tell me the quantity of water you use? *A.* No, sir; not for the boiler.

Q. How large is the feed pipe? *A.* One inch and a
347 quarter.

Q. Does that run direct into the boiler or into a well where you use a donkey pump? *A.* We dug a canal two years ago to get the fall into a cistern; we draw it from the cistern.

Q. With a donkey pump? *A.* Well, we use an injector; same thing; for the same purpose.

Q. You have always had water enough for that? *A.* Yes, sir.

Q. No part of the feldspar plant gets its power from the Byram river? *A.* Only for feeding the boiler.

Q. The plant is run by steam? *A.* Yes, sir.

Q. And always has been; now this pond that you speak of—there is no pond on the property of Mr. Pine
348 alone? *A.* No, sir.

Q. There is no dam on the property of Mr. Pine alone? *A.* Not alone.

FREDERICK MULLER, one of the complainants, recalled, testified:

By Mr. MARSHALL:

Q. Mr. Muller, you are one of the plaintiffs in this action against the City of New York to obtain an injunction against the City for diverting the waters of the Byram river? *A.* Yes, sir.

Q. How long have you lived on the farm there on 349
the Byram river—the West Branch of the Byram river?
A. Nine years.

Q. Have you during those nine years noticed that the flow of the West Branch of the Byram river had diminished? *A.* Oh, yes.

Q. When did you notice that? *A.* Well, about, I should say, about two years ago.

Q. Well, now, can you tell us what you saw? *A.* Well, I seen that the water was getting less and less.

Q. To what extent did it grow less; what was the least water that you have seen in those two years in the West Branch of the Byram river? *A.* I seen it so I could walk through it; the water was almost to a standstill, no movement in it. 350

Q. When did you last see the water almost at a standstill? *A.* I seen it not long ago.

Q. This summer? *A.* Yes, sir.

Q. Did you ever see it as low as that prior to two years ago? *A.* Yes, I have; not before that, but in the last two years.

Q. But I mean before two years ago did you ever see it as low as that? *A.* No, sir; I never seen it as low as that.

Q. The East Branch of the Byram river flows through your farm, does it not? *A.* Yes, sir.

Q. Do the two streams unite on your farm? *A.* Yes, sir.

Q. Prior to two years ago, was there any difference 351
in those streams in the summer time as to the quantity of water? *A.* There was always more water coming through the east stream than the west stream.

Q. There was more water coming through the East Branch of the Byram river? *A.* Here lately.

Q. I mean prior to two years ago, before the water of the West Branch was taken was there any difference between the two streams in the summer time? *A.* I couldn't tell.

Q. You don't remember; which had the most water

352 in it in the summer time? *A.* Oh, the West Branch had the most water.

Q. In the summer time? *A.* Yes.

Q. What is the condition of the East Branch this summer?

Objected to by defendants' counsel as immaterial.

Q. How has that been during the dry season of this summer? *A.* It is poor, but it is better than the West Branch.

Q. Better than the West Branch this summer? *A.* Yes.

Q. Does the water get pretty low in the East Branch during the summer?

353 Same objection as incompetent, improper and immaterial.

A. Yes.

Cross-examination:

By Mr. Dykman:

Q. You have no interest in what we call the Samuel Pine farm, have you; Mr. Pine owns his own place, does he not? *A.* Yes, sir.

Q. And you own yours? *A.* Yes, sir.

Q. Where is yours situated with reference to his—right opposite it? *A.* No; a little above it.

Q. You are above? *A.* Yes, sir.

354 *Q.* Does your farm cover both sides of the river? *A.* Yes.

Q. You are north of Pine's property; you are up the stream, are you not, from Mr. Pine's property? *A.* I have land on both sides of the stream.

Q. Your farm lies up the river from Mr. Pine's? *A.* Yes, sir.

Q. And the West Branch of the river and the East Branch join on your property? *A.* Yes, sir.

Q. Now, how far above the point where those two branches come together do you own? *A.* Well, they meet right on the line.

Q. On your north line? *A.* Yes, sir. 355

Q. Then your farm has both branches of the river flowing into it? *A.* Yes, sir.

Q. You know the point where the East Branch of the river strikes your property? *A.* Yes.

Q. Now, how much land do you own up towards Byram Pond from that point where the East Branch strikes the west? How far up the East Branch do you own? *A.* From the East Branch? Very little; hardly any.

Q. There is no dam on your property, is there? *A.* No, sir.

Q. You use the water for ordinary farming purposes? *A.* Yes, sir.

Q. Is that correct? *A.* Yes. 356

Q. How many acres have you there? *A.* 45.

Q. How much front on the river? *A.* 2,290 feet.

Q. On one side? *A.* No; both sides.

Q. Both sides; where do your cattle get water? *A.* Right there in the river.

Q. Have you ever seen the time when there wasn't water enough below the point where the East Branch of the Byram strikes the West Branch to water cattle? *A.* No, I have not.

FREDERICK MULLER.

Subscribed before me, }
March 20, 1900. }

JAMES A. RENWICK,
U. S. Examiner.

357

Further hearing adjourned to a day to be fixed (to be not earlier than August 21, 1899).

358 NEW YORK, October 26, 1899.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. WILLIAMS, Mr. MARSHALL, Mr. DYKMAN.

NEWTON S. JOHNSON, recalled:

By Mr. MARSHALL:

Q. Mr. Johnson, I show you this photograph and ask you what it is. *A.* This photograph is taken from the bridge looking north.

Q. From what bridge? *A.* From Mr. Pine's bridge.

359 *Q.* Were you present when that photograph was taken? *A.* Yes, sir.

Q. Does it represent a true picture of the locality? *A.* Yes, sir.

Mr. MARSHALL—I offer that photograph in evidence.

Mr. DYKMAN—I object, on the ground that they seek by that photograph to join two pieces of property, and thus make one litigation.

Photograph marked "Complainants' Exhibit 1, October 26, 1899."

Q. When was this picture taken, Mr. Johnson, about?

360 *A.* Those pictures were taken on the 31st of August, 1899.

Q. State if you can what that photograph shows (handing witness another photograph)? *A.* That photograph shows a view from the road opposite Mr. Muller's place, across the fence; about five or six hundred feet from the East and West branches of the Byram river.

Q. Whose land does it show?

Same objection.

A. Muller's land.

Q. Were you present when that photograph was taken? *A.* Yes. 361

Q. And the view is a true view of the condition of the premises at the time? *A.* Yes, sir.

Mr. Marshall offers the photograph in evidence.

Same objection.

Marked "Complainants' Ex. 2, Oct. 26/99."

Q. Have you made yourself acquainted with the size and dimensions of the pond that lays on Mr. Pine's land, near his southerly boundary line? *A.* Yes, sir.

Q. Can you state the dimensions of that pond? 362

Mr. DYKMAN—I object to that unless it is shown that this witness knows the boundary line and unless it further appears that Mr. Pine owns both sides of the river and the bed of the pond in question.

A. (Referring to memorandum) Well, the length of the pond is 1,387 feet; the width—I measured the pond in different places; the distance of the width across the pond 25 feet above the dam is 73 feet 10 inches; and about 300 feet above the dam is 70 feet 6 inches, and remains about the same for 300 or 400 feet above, and then it tapers off a very little; the depth of the water 25 feet above the dam, 7 feet 8 inches; depth of water from 150 to 200 feet above the dam, 8 feet 9 inches; and the height of the dam 11 feet 3 inches, from the bottom to the top of the dam. 363

Q. That pond is formed by damming the Byram river? *A.* Yes, sir.

Q. Mr. Pine owns on one side of that pond?

Mr. DYKMAN—I object to the conclusion of the witness as to facts as to which he has not been shown to have any knowledge whatever, the deed being the best evidence.

A. Yes, sir.

364 *Q.* Do you know who owns the opposite side of the pond?

Same objection.

A. Yes, sir.

Q. Who owns it? *A.* Solomon Reynolds and the Pentz estate.

Q. Is there a mill below the dam at this pond?

Objected to unless it is on the property covered by the complaint.

A. Oh, yes.

Q. Whose is that? *A.* Solomon Reynolds & Son's.

365 *Q.* Has that been there many years? *A.* Yes.

Q. How many years have you known of it?

Same objection.

A. Seven years.

Q. That has been operated by the water-power coming from this pond?

Objected to as incompetent, improper and immaterial and in no wise relating to the litigation in question.

A. Yes.

Q. Have you visited that mill during the past seven years? *A.* Yes, sir.

Q. How often? *A.* Well, I couldn't say how often;

366 sometimes nearly every day in the week, sometimes once in two weeks.

Q. Have you seen it in operation from this water-power?

Mr. DYKMAN—That is objected to; what water-power?

A. Yes, sir.

Cross-examined by Mr. DYKMAN:

Q. You say that this power is operated from this pond? *A.* It has been, yes.

Q. What power do you refer to? A. Water-power. 367

Q. Where is that located? A. Why, located just above the mill.

Q. Is it on the property in question of Mr. Pine? A. No, sir.

Q. Is it on Mr. Muller's property? A. No, sir.

Q. Is it in any way connected with it? A. No, sir.

Q. This pond to which you refer, is that the only source of water supply which furnishes the power? A. Mr. Pine's property——

Q. If I am wrong, please correct me. A. I would like to explain.

Q. Is there any part of the Wilcox dam or pond on Mr. Pine's property? A. We were not speaking of Mr. Wilcox's—— 368

Q. I mean Mr. Reynolds'. A. Yes, part of it; half of it is.

Q. One-half of it? A. Yes, sir.

Q. One-half of the Reynolds' pond is on the Pine property? A. Yes.

Q. Now, Mr. Johnson, so far as your knowledge is concerned, does not own any pond on both sides of that river, does he? A. He does not, as I know of.

Q. Now, is it not a fact that the Reynolds power is operated or was operated by the waters drawn from Byram Pond, in the State of New York? A. Well, it came down the river.

Q. Do you know where Byram Pond is? A. Yes, sir. 369

Q. Was there ever a dam built there? A. Yes, sir.

Q. Don't you know that that dam was raised at different periods by certain persons? A. I do.

Q. And when there was a dry season, the water stored by the persons owning Byram Pond was drawn down through the channels of Byram river and that Reynolds' mill was operated in that way? A. Yes, sir.

370 *Q.* Does Mr. Pine own any dam as an entirety on his own property? *A.* No, sir.

Q. Then this pond that you have stated to be about 1,387 feet long and to vary in width from 70 to 73 feet is not on the property of any one individual, to your best knowledge. *A.* Any one individual? No, sir.

Q. And the pond and dam to which you refer are in no way connected with this mill on the Pine property? *A.* No, sir.

Q. There is no mill on the property in question, assuming I mean the Pine property? *A.* Oh, yes, there is.

Q. What mill? On the Pine property alone? *A.*
371 Yes, sir.

Q. Where is it? *A.* It is on the Pine farm, his feldspar mill.

Q. That is run by water-power? *A.* Oh, no.

Q. There is no mill run by water-power on the property, is the question. *A.* No, sir.

Q. The only use made of the waters of the Byram river is the water led through a small pipe to feed the boiler? *A.* That is all.

By Mr. MARSHALL:

Q. Do you know whether there has been any change in the power at this mill below this dam near Mr. Pine's line?
372

Objected to, if it seeks to prove what has happened since the City built the dam.

A. Yes, sir.

Q. When did that change take place?

Same objection.

A. Well, for the past two years it has been run mostly by steam-power.

By Mr. DYKMAN: 373

Q. What mill do you now refer to? *A.* Reynolds' mill.

Q. Are you aware of the fact that the City of New York has settled with Mr. Reynolds a number of years ago for depriving him and his property of the use of the water-power? *A.* Yes, sir.

Q. And the mill to which you now refer is the mill covered by that agreement? *A.* Yes, sir.

By Mr. MARSHALL:

Q. Mr. Johnson, this mill which has been described by the counsel on the other side as Reynolds' mill is a mill that stands on the Byram river, a little below Mr. Pine's 374 southerly boundary line, is it not? *A.* Yes, sir; 139 feet.

N. S. JOHNSON.

Subscribed before me March 19, 1900.

JAMES A. RENWICK,
U. S. Examiner.

SAMUEL VAIL, being duly sworn and examined as a witness in behalf of complainants, testified:

By Mr. MARSHALL:

Q. What is your business? *A.* Well, I am an engi- 375 neer.

Q. Whereabouts? *A.* At Mr. Pine's feldspar mill.

Q. And how long have you been there? *A.* I have been there nearly three years; three years this month.

Q. And where did you work before that? *A.* Well, I worked at various places; I couldn't mention all the places; around by the day.

Q. Have you worked along the Byram river? *A.* I have.

Q. Where? *A.* At Mr. Wilcox's place, right above Mr. Pine's, a mile and a half or so.

376 *Q.* Where else on the river? *A.* Well, I worked in Glenville, in the blacksmith shop, right at the bridge there, above the woolen mills.

Q. Anywhere else along the river, East or West Branch? *A.* No, sir.

Q. How long did you work at Mr. Wilcox's? *A.* Twelve years.

Q. What were you doing there? *A.* At the trade, blacksmithing.

Q. How near were you to the river there? *A.* Well, within fifty feet of it.

Q. How long have you lived in the neighborhood of the Byram river, or the East and West Branches of it? *A.* Since 1855.

377 *Q.* Have you lived on the East Branch of the Byram river? *A.* No, sir.

Q. Or worked there? *A.* No, sir.

Q. What is your acquaintance with the country through which the East Branch of the Byram river flows? *A.* Well, I have been through a great deal of the country through there; it is a rough, narrow valley, most of it, up through, there is very little low ground around it, very little, so far as I have been on it; I have not been to the source at all, but as far as I have been, maybe two-thirds of the river.

Q. Have you been up the West Branch of the Byram river? *A.* I have; about nearly two-thirds of that.

Q. What is the character of that section? *A.* Well, so
378 far as I have been, the lower part of it is narrow valley, rough land, until you get to the upper part of it, and then that is low ground, swampy.

Q. Is it a broad, low ground? *A.* Quite broad.

Q. Have you ever had occasion to measure or to see measured the current of the East Branch of the Byram river at that point? *A.* I once saw a dam that was made across the river that the water flowed through an auger hole—I wouldn't want to swear, but I should judge an inch and a half.

Q. How big was that auger hole? A. I should judge 379
an inch and a half.

Q. When was that? A. I couldn't give you the date.

Q. About how many years ago? A. Well, I couldn't tell, because it went out of my mind.

Q. Five years ago? A. Yes, more than five.

Q. Ten years ago? A. Well, it was shortly before the New York City settled with the factories; I couldn't give the date.

Q. But it is more than five years ago? A. Oh, yes.

Q. What season of the year, could you tell that? A. I think it was along in August, if I ain't mistaken; I wouldn't say positive, but I think it was.

Q. From your acquaintance in the past with the East 380
and West Branches of the Byram river, which had the best flow of water, the largest and most constant flow of water? A. Well, take it on an average, I should judge that there wasn't a great deal of difference, the year round, at the time that I worked at Mr. Wilcox's, when I had a chance to see the river; there wasn't a great deal of difference in the two streams, because they were leading from Byram Pond then; take it on an average I don't think there was much difference in the two streams.

Q. Because they were doing what? A. They were using the water from Byram Pond all the time I was working there.

Q. Who was using it? A. The factories; Mr. 381
Wilcox.

Q. Tell me how they used it?

Objected to on the ground that the use of the water by the factories is immaterial here, there being no factory on the property in question, and there being no vested rights in the head waters of the Byram river or the reservoir in question.

Q. What became of the water after they used it? A. Well, it went down the stream to the rest of the factories, and flowed into Long Island Sound.

382 *Q.* Come on down the Byram river? *A.* Yes, sir.

Q. Now, take the section of country north of Mr. Pine's land, up to the dam which the City has built, and state what you can of streams or brooks or springs which flow into the Byram river, and the West Branch of the Byram river; how many do you know of? *A.* Well, there isn't any that flows in that I know of in the summer time, unless it is wet weather; they dry up; there are only small little streams that run in; they dry up when it comes warm weather.

Cross-examined by Mr. DYKMAN:

Q. Mr. Vail, when you say you are an engineer, you
383 mean to say that you are the engineer at the present mill on the Pine property running the steam-engine? *A.* Yes, sir.

Q. How long have you been there? *A.* Three years.

Q. That mill has been constantly running? *A.* Not every day.

Q. Well, been running when you had work to do? *A.* Yes, sir.

Q. Is that mill run by the waters of the Byram river? *A.* The boiler is supplied——

Q. Is the mill itself? *A.* No, sir; it is run by steam.

Q. Is it not a fact that the sole use that you make of the waters of the Byram river is feeding the boilers?
384 *A.* Yes, sir.

Q. How large is the pipe running from the Byram river to the boilers or to the pump that furnishes it? *A.* One and a half inches.

Q. It has been testified to here by some witness on behalf of Mr. Pine that there has always been water enough to supply the boilers; is that correct? *A.* Well, it has so far.

Q. I mean up to the present time? *A.* Yes, sir.

Q. Now, when you say that they were drawing the

waters from Byram Pond, is it or is it not a fact that you mean that the mill-owners who controlled the reservoir were drawing water in a dry season to operate their mills—Russell, Birdsall & Ward, Tingue, House & Co., and the other persons? *A.* Yes, sir. 385

Q. Including the man in whose employ you were, Mr. Wilcox? *A.* Yes, sir.

Q. Did you know this river before Mr. Wilcox and those other gentlemen purchased their rights, in 1864? *A.* No, sir; before? Oh, yes.

Q. 1864; before that? *A.* Yes, sir.

Q. Then before that dam was built you were only dependent, were you not, upon the natural flow of the stream? *A.* Well, I wasn't working there at that time; not at that time; not until after they built the dam. 386

SAMUEL VAIL.

Subscribed before me }
March 20, 1900. }

JAMES A. RENWICK,
U. S. Examiner.

Complainants' counsel reads in evidence the following Connecticut statutes: "An Act to encourage the erection and support of water-power manufactories," chapter 26, Public Acts of Connecticut, 1863 and 1864; approved July 6, 1864. Also, "General Statutes of Connecticut, 1875," chapters 472, 473, 474; "General Statutes of Connecticut, 1880," chapter 92. Also, "General Statutes of Connecticut, 1875," chapter 234, section 18. Also, "General Statutes of Connecticut, Revision of 1887," in force January 1, 1888, sections 1216 to 1225 and section 2687. 387

Objected to by Mr. Dykman as incompetent, improper and immaterial, and that if they are general statutes they may be considered by counsel on either side at any stage of the proceedings and are not here necessary.

It is stipulated that if Mr. Lawrence B. Jenckes, of Stamford, Conn., a witness heretofore called in this

388 proceeding, were recalled, he would testify that he assumed the average flow of 24,000,000 gallons per day or 1,000,000 gallons per hour, and that power would only be used for ten hours a day, as in ordinary manufacturing, and that sufficient pondage could be obtained to maintain a flow of 1,000,000 gallons per hour for ten hours, or 10,000,000 gallons per day.

This testimony is objected to by Mr. Dykman on the ground that the plaintiffs in this action do not own any land to form a dam or pond; that the lands in question cannot be joined for the purposes of this action, and that no power whatever exists on the property of either of the plaintiffs.

389

Complainants' testimony closed, with the right reserved to complainants to recall Mr. George W. Birdsall.

Adjourned to November 16, 1899, at 1.30 P. M.

NEW YORK, December 21, 1899.

Met pursuant to adjournment.

Present—Mr. RENWICK, the Examiner; Mr. MARSHALL
390 and Mr. WILLIAMS, for plaintiffs; Mr. DYKMAN, for defendants.

Defendants' counsel move to dismiss the complaint and all the proceedings taken thereunder, on the ground that there is an improper joinder of parties, and on the further ground that no damage whatever has been proven; on the further ground that the plaintiff has not proven irreparable damages, and that the City of New York is adequately responsible and able to pay any monetary damages.

SAMUEL PINE, recalled by defendants' counsel:

By Mr. DYKMAN:

Q. Mr. Pine, when did you buy this farm? *A.* Father bought it in 1870.

Q. Do you know what he paid for it? *A.* $13,000, I think; he might have paid $13,500.

Q. How many acres are there in the farm? *A.* Something over 100; I think 102.

Q. What proportion of this farm do you cultivate—do you work? *A.* Well, I generally work about—different years different amounts.

Q. Well, as a rule what proportion do you work? *A.* Well, we generally raise about two to three acres of potatoes; about seven or eight acres of corn; that is our average.

Q. Then as a rule you cultivate from ten to fifteen acres each year out of the 100? *A.* I think that would be an average.

Q. How many head of stock do you keep there? *A.* Well, at present we have got four cows, pair of oxen and I think seven horses.

Q. And that is about the average amount of stock you keep? *A.* We do at present; since we opened the quarry we have cut down our cattle stock.

Q. When did you open the quarry? *A.* About five years ago, I think.

Q. From what source do you get the water for these cattle in the winter, for the horses and the oxen? *A.* From a brook behind the barn, a little brook behind the barn.

Q. Not from the Byram river in the winter? *A.* Not from the Byram river in the winter.

Q. You use the Byram river for what purpose? *A.* For the mill and summer pasture, and house purposes.

Q. You use it for the mill? You mean to say, to supply the boiler with water? *A.* To supply the boiler with water.

394 *Q.* And not to run the mill? *A.* Well, the boiler is to run the mill, I suppose.

Q. The mill is not run by water-power, it is run by steam? *A.* It is run by steam, yes.

Q. And you have a canal leading from the river to a cistern and from that cistern you draw the water for the boiler? *A.* Yes.

Q. How much water do you use a day there for that purpose? *A.* I can't answer that; I have heard the engineer——

Q. I don't care what you heard, but as a rule how many hours a day do you run that mill, or have you for the last five years? *A.* Well, when we run by the day, I think they run ten hours; sometimes overtime
395 and sometimes not; I think they close some days at half-past five and some days it is later.

Q. Well, ten to twelve hours a day—you run from ten to twelve hours a day? *A.* From ten to twelve hours; sometimes they run all night.

Q. You opened it when, in 1894 or 1895? *A.* I can't tell you without the books.

Q. Well, the Byram river is the only source of supply for water for this boiler? *A.* Yes.

Q. And you have always had water enough for that boiler? *A.* Always had water enough.

Q. Do you own one or two sides of the Byram river? *A.* One.

Q. There is a dam below your property, is there not,
396 owned by Reynolds—a mill or factory of some kind? *A.* Yes.

Q. Have you no interest in that? *A.* No.

SAMUEL PINE.

Subscribed before me }
March 20, 1900. }

JAMES A. RENWICK,
U. S. Examiner.

FREDERICK MULLER, recalled by defendant's counsel: 397

By Mr. DYKMAN:

Q. For what purpose do you use the waters of the Byram river on your farm? *A.* For my cattle.

Q. How many cattle do you keep? *A.* I keep twelve head of horned cattle, two of horses.

Q. And they go to this brook and drink? *A.* Yes.

Q. And always have? *A.* Yes.

Q. The brook is accessible from the fields? *A.* Yes, sir.

Q. And there has always been water enough in that river to water those cattle, has there not? *A.* So far, yes sir.

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FREDERICK MULLER.

Subscribed before me
March 20, 1900.

JAMES A. RENWICK.

FRED. K. BETTS, called as a witness for the defendant, being first duly sworn, testified:

Direct examination:

By Mr. DYKMAN:

Q. Where do you live? *A.* At Kensico Station.

Q. What is your occupation? *A.* Civil engineer. 399

Q. Do you hold any official position in the government of this City? *A.* I am assistant engineer of the Department of Water Supply.

Q. Stationed where? *A.* Kensico.

Q. How far is that from the Byram river? *A.* It is about two and one-half miles in a direct line.

Q. Are you acquainted with the Byram river? *A.* I am.

Q. Have you made surveys of it? *A.* I have.

Q. You know it, do you not, from its source to its mouth? *A.* Perfectly familiar with it.

400 *Q.* Have you driven along it? *A.* Yes, and walked along it.

Q. The City of New York has built a dam, within the State of New York, have they not, on the Byram river? *A.* Yes, sir.

Q. On which branch? *A.* On what is known as the West Branch.

Q. Are you acquainted, generally speaking, with the East Branch? *A.* Not so well; only at its mouth, where it empties into the main stream.

Q. Were any gaugings ever kept of the flow of the Byram river by the City of New York, by you or in your department? *A.* I kept the flow there for one summer, at the point where the dam is located, above
401 the State line.

Q. That would include at the West Branch only? *A.* The West Branch only.

Q. Do you know the drainage area of the East Branch above the Pine property and the drainage area of the West Branch below your dam? *A.* Not by actual survey, but by measurement on the maps published by the Geological survey of the United States Government it measured 18.22 square miles.

Q. Referring now to the gaugings of the stream of the West Branch of the Byram river, during what months of 1895 were the gaugings taken? *A.* I think from June until December.

Q. Do you or do you not keep in your official capac-
402 ity a rain gauge of the Kensico Dam showing the rainfall? *A.* We do; have for twenty years.

Q. Can you tell me whether the summer of 1895 was what we call a dry summer or wet summer? *A.* It was a dry summer.

Q. Beyond the average? *A.* There have only been two drier summers in sixteen years, including the present.

Q. Look at the paper I now show you and see if it was made by you, under your direction? *A.* Yes, sir; I prepared this paper.

Q. What does it show? *A.* It shows the gaugings

of the Byram river during the months of August, September and October, 1895. 403

Q. What was the average daily flow of the river during those months, approximately? *A.* During August the average daily flow per square mile was 121,127 gallons; during the month of September the daily flow per square mile was 145,055 gallons; during the month of October the mean daily flow per square mile was 257,719 gallons.

Q. Then the average daily flow would be something over 1,000,000 gallons per day? *A.* Not per square mile; for the 18.22 square miles it would average over 1,000,000 gallons a day.

Q. You know the Pine property, do you not? *A.* I do. 404

Q. Have you ever been on it? *A.* I have.

Q. Seen the feldspar mill? *A.* I have been in the mill.

Q. Seen the boiler? *A.* Yes; although I don't recall it to mind; I remember looking at it.

Q. Now, referring to 1895 as being one of the driest years that we have had in the last sixteen years, how many days were there during the entire summer of 1895 when the flow of water in the Byram river above the Pine property was less than 1,000,000 gallons a day? *A.* There were just ten days.

Q. Now, for those ten driest days of these two driest years, what was the flow? *A.* (Referring to paper).

Mr. MARSHALL—What paper is this that he is using? 405

Mr. DYKMAN—Just a memorandum of figures he has taken.

A. The very least flow recorded for any day, and that for one day only, was 462,296 gallons.

Mr. MARSHALL—And that was when?

The WITNESS—In the month of September.

Q. What was the rainfall for the month of August, 1895? *A.* (Referring to paper) 2.91 inches.

406 *Q.* What was the average rainfall per year in that section? *A.* The average rainfall, based on sixteen years' observation, is 47.93 inches per year.

Q. Nearly 4 inches a month? *A.* 3.99; nearly 4 inches.

Q. Now, how many inches of rainfall were there in September, 1895? *A.* 1.65.

Q. And in October? *A.* 4.09.

Q. Then it was during September, 1895, when there was less than 1¾ inches of rainfall you had this severe dry day? *A.* Yes.

Mr. Dykman offers in evidence paper used by witness, and it is marked "Defendant's Exhibit, Betts' Memorandum."

407 *Q.* When was this water diverted by the City; when was this dam built, Mr. Betts? *A.* I think in 1896; when these gaugings were taken in 1895 we were excavating for the reservoir there, and I think it was completed the next year, although I am not positive as to the exact date.

Q. How many square miles of drainage area are there diverted by the dam? *A.* 8.66 square miles.

Q. The gaugings were taken at that point in the West Branch of the Byram river? *A.* Yes.

Q. And the flow as shown by the paper is the flow from the drainage area of 8.66 square miles? *A.* It is.

Q. And when you testified to the amount of flow in
408 the river, you took that as your basis and the other data was the 18.22 square miles which Pine has the benefit of? *A.* That is correct.

Cross-examined by Mr. MARSHALL:

Q. Mr. Betts, you testified, as I understood you, that there was a certain day in September, 1895, that you fixed upon the lowest flow? *A.* Yes, sir.

Q. And what was that flow; how many gallons? *A.* (Referring to paper) 462,296.

Q. Will you show me those figures on that paper

(indicating Defendant's Exhibit, Betts' Memorandum)? 409
A. They are not there.

Q. Now, from what do you get those figures? *A.* From using the number of gallons per square mile, as measured on the area diverted, and multiplying it by 18.22, the remaining area.

Q. Now, where, taking this paper, Defendant's Exhibit, Betts' Memorandum, are the gaugings taken, at what point? *A.* At the point where the dam was built, above the State line.

Q. And near the State line? *A.* About five hundred feet above it.

Q. Is there more than one dam there? *A.* Only one near there.

Q. And this gauging under the heading "Amounts 410
Measured" shows what? *A.* Shows the amount that was measured over the weir established at that point.

Q. And was the entire flow of the Byram river to what extent? *A.* For 8.66 square miles.

Q. Being the entire flow for that area which you admit the City has diverted the water, draining into the Byram river? *A.* That is it.

Q. Now, looking at that paper, do I understand you that the gauge showed, for instance, that on the 11th day of September there was a flow of 568,719 gallons? *A.* Yes.

Q. And that on the 13th it fell to 219,732? *A.* Yes.

Q. And on the 15th to 219,732? *A.* Yes.

Q. The rainfall shown on this paper, 2.91, for the 411
month of August, is the average rainfall as averaged by you for that month? *A.* No; it is actually measured; actual rainfall.

Q. For the month? *A.* For the month of August, 1895.

Q. And this rainfall of 1.65 for September is the average rainfall for that month? *A.* No; it is the actual rainfall; measured rainfall.

Q. Have you any record as to what the actual rain-

412 falls were on the various rainy days of those months? *A.* Not with me now; it is obtainable.

Q. Could you identify that paper shown you, Complainants' Exhibit, November 16, 1897, as stating the rainfalls (handing witness paper)? *A.* No, sir.

Q. Could you take the figures of the rainfalls for the days of the month of September, 1895, as stated on this paper, Complainants' Exhibit, November 16, 1897, and see whether the average agrees with the average of your paper? *A.* They are not averages, I take it; they are actual.

Q. Well, see whether the actual figures agree with the figures stated on your paper, Defendant's Exhibit, Betts' Memorandum? *A.* The total for September is
413 1.65 on this paper.

Q. According to Complainants' Exhibit, November 16, 1897? *A.* Yes.

Q. Then they do agree in those results, the two papers? *A.* They seem to for that month.

Q. Now, I call your attention to Complainants' Exhibit, November 16, 1897, to the figures thereon opposite the date September 26, and ask you whether that paper shows a rainfall on that day of .58 of an inch? *A.* Yes, it does.

Q. Now, can you explain why it is that the figure in the next column, on the day following, September 27, shows a lower flow? *A.* Only that it actually measured that.

414 *Q.* Is it possible that it could have measured less after a rainfall of over half an inch? *A.* Yes.

Q. Can you explain how? *A.* Only that it actually did; that is all.

Q. Well, is that reasonable to you? *A.* I don't know whether it is reasonable or not; it is possible.

Q. I ask you as a civil engineer whether, after a rainfall of half an inch on this area surrounding the Byram river it is possible that it would lower in the next twenty-four hours the flow of the river? *A.* It is possible.

Q. And it is also possible that you could have a

rainfall of over half an inch on the 26th without increasing the flow of the Byram river at that point on the 26th over the flow on the 25th? *A.* Yes.

Q. Mr. Betts, I call your attention again to this Complainants' Exhibit, showing a fall of .48 of an inch on the 12th of September, and a flow on that day of 351,571 gallons. *A.* Yes.

Q. I show you on that paper that on the 13th, the day following this rainfall of .48, there was a flow of 219,000 gallons, is that possible? *A.* Yes.

Q. Can you explain to us how or why it is possible? *A.* Because when the country is very dry a slight rainfall of that kind doesn't get into the streams at all; it is simply taken up by the dry surface soil, without affecting the flow of the stream.

Q. I show you again Complainants' Exhibit showing no rainfall and a flow of 284,359 gallons on September 4, and I show you date of September 5, showing a flow of 351,569 gallons; how can you explain that increased flow if there was no rainfall? *A.* About four miles above, on a tributary of that stream, was a mill, which might, perhaps, affect the flow from day to day.

Q. Where is that mill? *A.* That mill is what is known as Sam's Mills, about a mile and a half above Armonck.

Q. And is on the West Branch of the Byram river? *A.* It is on the Wampus river, a tributary of the West Branch of the Byram river.

Q. The Wampus river flowing from Wampus Lake down to the Byram river? *A.* Yes.

Q. I show you Complainants' Exhibit 1, May 5, 1899, and ask you whether that is a map prepared from the United States Geological Survey maps, which you referred to in your testimony? *A.* Yes; that is printed from the same plate, apparently.

Q. You gave a drainage area in your testimony of 18.22 square miles; will you state again what that drainage area is, what it is made up of, in point of locality? *A.* It is made up of the entire area that

418 drains into the Byram river above Samuel Pine's, exclusive of the area diverted by New York City.

Q. And including both the East and West Branches of the Byram river? *A.* Of the East Branch and the West Branch below the point of diversion.

Q. And the area from which you say the waters have been diverted by the City of New York is something over 8 square miles? *A.* 8.66 square miles.

Q. Then is it in your opinion correct that the entire drainage area there was 18.22 plus 8.66? *A.* I think that is reasonably correct.

Q. Now, does this 8.66 square miles lie above the city dam? *A.* Yes.

Q. Now, taking the 18.22 square miles, will you tell
419 me what portion of that you assign to the drainage area of the East Branch? *A.* I haven't separated the two in my calculations of areas at all.

Q. You can do so? *A.* No.

Q. You can't divide that 18.22? *A.* I have no means here of doing it.

Q. Is the 18.22 miles assigned by you entirely to the area drained below the city dam? *A.* It is.

Q. But inclusive of the East Branch? *A.* Yes.

Q. Now, you can't divide that at all between the East Branch and the main branch of the Byram river below the dam? *A.* Not in my mind; I can do it on the map.

Q. Well, look at this map——? *A.* It would take me about half a day to study those contours and locate
420 that line to make that division, and then when I did it I would have to calculate the area in addition.

Q. How far is the Kensico dam from the State dam near the Connecticut line? *A.* What do you mean by the State dam?

Q. I mean the dam built by the City of New York near the State line? *A.* I should think it might be three miles and a half in a straight line.

Q. You testified that the summer of 1895 was a dry summer, and that there were only two drier summers within a certain period of years; what

were those two drier summers? *A.* I don't recall 421
now; I remember looking over it to see how many there were.

Q. Can't you give me your best idea on that point?

Mr. DYKMAN—I object to the witness guessing.

Q. You don't know what those two drier summers then were? *A.* No, sir.

Q. Do you know whether they occurred within ten years? *A.* Well, I think they occurred within three or four years; still I am not positive as to that.

Q. Are you positive they occurred within five years? *A.* Well, I have a list in my pocket, if I can look at that (referring to paper); they were the summers of 1891 and 1892; I said two; that was a fault of mem- 422
ory; there were three.

Q. What was the third? *A.* The third was 1895.

Q. Now, then, down to the present moment, the summers of 1885, 1891, 1892 and 1895 were the driest summers; is that true? *A.* That is true.

Q. Now, Mr. Betts, can't you look at that map and make a rough estimate apportioning that drainage area of 18.22 square miles as between the main Byram river below the city dam and the East Branch?

Mr. DYKMAN—I object to it on the ground it is too remote.

A. I don't think I can give you any definite idea in 423
regard to the matter; it is simply a matter of guess.

Q. Well, I will take your guess.

Mr. DYKMAN—I object to his guess.

Q. Well, give your best estimate. *A.* In order to make an estimate, why I should want to have a half a day to study those contours and trace the line from them.

Q. Well, looking at this map of the U. S. Geological

424 Survey, Comp. Ex. 1, May 5, can you tell me whether the drainage area of the East Branch of the Byram river appears to you to be ten square miles? *A.* Not by looking at that map; there is no watershed line on there; there is a map has it on, but I can't tell from that map.

Q. There are contour lines showing elevations on that map? *A.* Yes; it would be necessary to study those contour lines and locate the watershed.

Q. Then as an engineer you can't tell from that map whether the drainage area of the East Branch is ten miles or not? *A.* Not by just looking at it, without tracing the line.

Q. Now, what map do you refer to that there is here
425 that shows the drainage area? *A.* The map that I sketched the watershed line on.

Q. You haven't produced that map here yet? *A.* No.

Q. You testified in September, 1895, the mean daily flow per square mile was 145,055 gallons?

Mr. DYKMAN—Not per square mile.

Q. You testified to a mean daily flow in September, 1895, of 145,055 gallons?

Mr. DYKMAN—He said that was the product of the 8.66 square miles.

Q. You remember testifying, do you not, to a mean daily flow in September of 145,055? *A.* Not to such
426 a question as that, I didn't testify.

Q. Did you testify to a mean daily flow anywheres in or around the Byram river measured by you or estimated by you of 145,055 gallons? *A.* Yes.

Q. Now, on what day did that take place? *A.* That is the mean daily flow for the month, the mean of the thirty-one days; the total amount for the month, divided by the number of days in the month, giving the mean daily flow.

Q. And that was measured at this dam—that was taking the daily number of gallons from your Kensico dam gauge?

Mr. DYKMAN—No. No. 427

Q. Well, from where; where did you get your daily number of gallons, from which you made this computation of 145,055? *A.* I took the measurements as measured on the weir of the Byram dam, or the Byram Tunnel dam, as we call it; reduced that to a basis of so many gallons per square mile and multiplied that by the 18.22, reducing it to the watershed area above Pine's; and my figures are based on that.

Q. You stated that this City dam was constructed you thought in 1896? *A.* I think it was completed in about 1896.

Q. When was the water there first actually diverted? *A.* I don't remember; I think not for a year later, but still it is only a matter of judgment; I don't know. 428

Q. In your direct examination you referred, as I understood you, to a flow which had been measured or estimated of one million gallons north of Pine's; will you state more fully what you meant by that? *A.* I testified that during those three months—three dry months of the summer of 1895—that there were only ten days during which the flow was less than one million gallons per day on that 18.22 square miles.

Q. That was in 1895? *A.* That was in 1895.

Q. Well, at that time you hadn't diverted the flow from the 8.66 square miles by the erection of the City dam, had you? *A.* No.

Q. How did you get at that one million gallons? *A.* By reducing the flow, as measured at our weir, to the number of gallons per square mile, and multiplying it by the 18.22. 429

By Mr. WILLIAMS:

Q. Then you have no actual means of knowing what was the flow north of Mr. Pine's place? *A.* We have no gaugings at Mr. Pine's place.

Q. And it is merely an assumption on your part that

430 the flow from the 18.22 square miles would be the same proportion as the flow from the 8 square miles? *A.* That is correct, from the 8.66.

Q. You make no allowance for water being held by swamps or flowing more quickly over rocky soil, and so on? *A.* I don't think any allowance should be made, as the character of the watershed——

Q. My question is, you don't make any allowance? *A.* No.

Re-direct examination:

By Mr. DYKMAN:

Q. Should any allowance in your opinion be made for this running over rocks and so forth, mentioned by
431 Mr. Williams? *A.* I think not.

Q. One of these gentlemen asked you whether or not you had diverted any water from this 18.22 square miles at the time of this dry summer; you never have diverted any water as a city from this 18.22 square miles? *A.* Not at that time we hadn't.

By Mr. MARSHALL:

Q. Not at what time? *A.* At the time the gaugings were made.

By Mr. DYKMAN:

Q. Well, have you now? *A.* We are doing it at the present time, yes.

432 *Q.* What area are you diverting? *A.* 8.66 square miles.

Q. What is the area below the dam, down to Pine's? *A.* The area of the East Branch—of all the Byram river above Pine's, exclusive of the diverted area, I measured to be 18.22 square miles.

Q. That is what I asked you; then you are not at the present time and never have been diverting any part of the 18.22 below the dam built by the City? *A.* We have no means of diverting it.

Mr. DYKMAN—That is it exactly.

Re-cross examination: 433

By Mr. MARSHALL:

Q. You were asked a question in respect to allowances either way for flowing through swamp lands or flowing over a rocky or hard surface; as a matter of fact, the fact of swamp lands or hard or rocky surface lands does have an intimate relation to the flow, does it not, in drainage areas? *A.* In the matter of equalizing the flow; in the matter of total amount, I think not.

Q. What equalizes the flow? *A.* The swamp land would equalize the flow without reducing it in the aggregate.

April 2, 1900. 434

FRED. K. BETTS,
By JAMES A. RENWICK,
U. S. Examiner.

NATHAN J. HUGHES, called as a witness for the defendant, being first duly sworn, testified:

Direct examination:

By Mr. DYKMAN:

Q. Mr. Hughes, where do you live? *A.* White Plains.

Q. What is your business? *A.* Pumping engineer for the Village of White Plains. 435

Q. At the White Plains water-works? *A.* Yes, sir.

Q. Do you know where this Pine property is? *A.* Yes.

Q. Have you ever seen it; who took you over there? *A.* I went with Mr. William L. Banks, the gentleman who is here this morning.

Q. Did you see the mill? *A.* Yes.

Q. And the boiler? *A.* Yes, sir.

Q. And went all through it and saw the machinery? *A.* Yes, sir.

Q. And the canal? *A.* Yes, sir.

436 *Q.* And the cistern? *A.* Yes, sir.

Q. What is the capacity of the cistern up to the level of the water in the brook; you can refer to any memorandum you made yourself, any calculation? *A.* 1,700 gallons.

Q. The cistern will hold that up to the level of the water in the brook? *A.* Yes, sir.

Q. How was the water taken from that cistern to feed the boiler? *A.* By an open ditch running directly ——

Q. No, but from the cistern to the boiler? *A.* Oh, a pipe connecting with his feed supply.

Q. There is a canal leading from the river into the cistern? *A.* Yes, sir.

437 *Q.* It has been stated here that this boiler is an 80-horse-power boiler; assuming that statement to be true, how much water would it take to supply it per hour, running under full head? *A.* The estimates I have made, 285 gallons per hour.

April 2, 1900.

NATHAN J. HUGHES,
By JAMES A. RENWICK,
U. S. Examiner.

WILLIAM L. BANKS, called as a witness for the defendant, being first duly sworn, testified:

438 *Direct examination:*

By Mr. DYKMAN:

Q. Mr. Banks, you live where? *A.* I live at present and for twenty-five years past at White Plains, Westchester County, New York.

Q. Where did you live before that? *A.* New Rochelle and Portchester.

Q. Did you ever live in the Town of Northcastle? *A.* I was born in that town, near the boundary line.

Q. You are familiar with what we generally call the Byram valley? *A.* Yes, sir; known it all my life.

Q. Know the farms down there? *A.* Yes, sir.

Q. Have you ever bought and sold any real property? *A.* I have bought and sold for the past twenty-five years real estate of all kinds outside of New York City.

Q. Have you ever been called upon to act as an appraiser of real estate? *A.* I have, for institutions, savings banks and loan associations, County Treasurer, Westchester County, and of the Village of White Plains, New York City, private individuals.

Q. Have you been called upon to value property where loans are to be made? *A.* Yes, sir.

Q. Employed by savings banks for that purpose? *A.* Yes, sir.

Q. Property of all kinds? *A.* All kinds.

Q. Do you know the Pine property? *A.* I do.

Q. And the Muller property? *A.* I do.

Q. How long have you known them generally? *A.* Forty years.

Q. Have you recently examined the Pine property? *A.* I have.

Q. When? *A.* Within two weeks; I examined it several times; the last time within two weeks, within ten days.

Q. Who showed you over the property on your first visit there to qualify yourself? *A.* Mr. Samuel Pine.

Q. What part of the farm did Mr. Samuel Pine show you? *A.* He showed me nearly the whole farm; the part along where the buildings are and along the river more particularly than the other.

Q. Did you go west upon the high ground? *A.* Yes, sir.

Q. What kind of a farm is that, Mr. Banks, as to topographical situation? *A.* It is rather a rough farm, not much level land, and part of it along the river; the southerly part of it is rocky or rock cropping out, covered with a thin soil; the northerly part along the bed of the river is more smooth and more productive; the westerly part is hilly, sloping to the east, most of it; there is some good land on the westerly part of it.

442 *Q.* Can you fix the days when you were there, any one or two days prior to the recent storm in our section? *A.* As to the day of the month? I don't know as I can, then.

Q. Were you there two weeks ago Sunday? *A.* Yes.

Q. You were there on December 3, two weeks ago Sunday? *A.* I suppose that is the 3d.

Q. I was there with you? *A.* Yes, sir; and I was there about a week after.

Q. Well, did you notice the Byram river when you were there December 3d? *A.* I did.

Q. What condition did you find it as to supply of water? *A.* Well, I found the water running over a bed
443 about twenty feet in width, on an average; the river varies from twenty to twenty-five feet in width, and the water was running over a bed of about twenty feet in width and an average—in some places it is stony bottom, it flows more swiftly and not so deep—but an average in the neighborhood of six inches.

Q. You have had some experience with farming? *A.* I have.

Q. And the requirements of cattle? *A.* I have; I was born and brought up on a farm and lived there until I was twenty-five years old, about, and I own a farm now; did own one in Connecticut in this same town.

Q. Was there water enough there on December 3d
444 for the uses of that farm? *A.* Yes, sir; plenty.

Q. From your general experience, covering a period of thirty or forty years, and from your examination of this farm, what, in your opinion, was its market value? *A.* I would consider that farm worth now—its market value—$10,000.

Q. What effect on the value of that farm, if any, has the taking away of portions of the head waters of the Byram river had? *A.* It has not decreased its value in my judgment at all.

Q. Now, coming to the Muller property, above; have 445
you examined that property? *A.* I did.

Q. Do you know where the East Branch of the Byram river intersects the West Branch? *A.* They intersect just at the northerly edge of Mr. Muller's farm.

Q. What sort of a farm is Muller's? *A.* His farm, the easterly portion of it, is a smooth bottom land along the valley of the Byram river; he owns on both sides of the river; the westerly part of it is meadow, and more hilly, and some rock; the house stands back from the road and a lane leads up to it; the buildings are in fair condition; there is a good orchard at the northerly part; a very good small farm.

Q. What is the quality of the land between the road and where the buildings stand? *A.* It is a bottom, 446
meadow land along the side of the river.

Q. Now, when you were there on December 3, did you notice whether or not there was any water in the West Branch of the Byram river? *A.* Yes, sir; there was.

Q. Entirely separate and disconnected from the East Branch at the point where you made your observations? *A.* Yes, sir.

Q. That water was flowing in the old bed of the West Branch of the Byram river then? *A.* Yes, sir.

Q. What in your opinion is the value of the Muller property? *A.* The Muller property is worth from $5,000 to $6,000; not to exceed $6,000.

Q. What effect, if any, on the market value of that 447
property has the diversion of the head waters of the Byram caused? *A.* It doesn't affect its value; there is sufficient water for all purposes in the river, and in the little stream that runs through it into the river also.

Q. Well, eliminate that stream entirely? *A.* There is sufficient water there for all purposes.

Q. How far from the point where the West Branch intersects the East Branch were you when you made your observations, when you state there was water in

448 the West Branch of the Byram river? *A.* Well, I observed it—the West Branch is the northerly boundary of part of Mr. Muller's farm; I think it leaves the East Branch and runs westerly for several hundred feet before it leaves his farm, and then I have been up it and across the bridge over the West Branch; several places I observed it.

Q. And there was water flowing there? *A.* Yes.

Q. Freely or sluggishly? *A.* Flowing at about the same rate as the East Branch and about half the quantity of the East Branch.

Cross-examined by Mr. MARSHALL:

Q. Mr. Banks, how long have you been engaged in
449 this real estate business? *A.* Well, twenty-five years; I don't recollect the first, but it is certainly twenty-five years that I have been engaged in the real estate business.

Q. Have you ever been engaged in any other business? *A.* I was engaged in the hotel business prior to that.

Q. When did you give that up? *A.* Well, I don't recollect the year; 1877 or 1878, I think, about.

Q. Have you ever done any other business within this twenty-five years than this business of handling real estate? *A.* Examining titles, making abstracts and loans, that is in relation to real estate; I was in the Sheriff's office in Westchester County for six years;
450 I think 1877, 1888 and 1889 I was connected with the Register's office also.

Q. Are you a lawyer? *A.* No, sir.

Q. Have you been familiar with this Pine property for forty years? *A.* I have known it in a general way for forty years.

Q. How many times have you been there in forty years? *A.* I have been by it every year, and two or three times a year, but had no occasion to go upon the farm; I was upon the farm some years ago, at the house.

Q. How many matters have you acted in, in the

way of selling land or mortgaging land, in the Byram valley, in the neighborhood of the Pine farm? *A.* Well, just in the neighborhood of the Pine farm, I don't recollect now; in the Village of Portchester—— 451

Q. No; I asked you to confine it to the neighborhood of the Pine farm; now, take the Muller farm? *A.* Well, that is near the Pine farm.

Q. Now, going north of the Pine and Muller farms, towards the State line, how many real estate transactions there have you been cognizant of? *A.* Well, several on King street.

Q. How far is King street from Mr. Pine's farm, in an air line? *A.* About a mile.

Q. What transactions did you handle on King street? *A.* Well, I was familiar with transactions; my cousin, I had something to do with his buying a farm on King street, called the Field farm; that is further north. 452

Q. How much further north? *A.* Five or six miles.

Q. Have you anything nearer to the Pine property on King street? *A.* I don't recollect now, just in that immediate vicinity; I owned a farm in the same town, but further north.

Q. What is the character of the improvements along King street? *A.* As fine as there is in the world.

Q. They are not farms along King street, are they, in the common acceptance of that term? *A.* Well, they are more residences for country gentlemen.

Q. Are the residences extensive and spacious? *A.* Some of them very, and there are some farms. 453

Q. What is the value of land per acre on King street, take it about the point nearest to Mr. Pine's land?

Objected to by defendant's counsel as incompetent, irrelevant and immaterial.

A. Including buildings?

Q. No; I will take the land without buildings? *A.* Well; now, it varies; from $200 to $500 an acre.

Q. Is that the highest value that you have known to have been paid on King street for land? *A.* Yes, sir; $500 an acre without buildings.

454 *Q.* Do you know actually of any sales of farms in the valley of the Byram river, starting from Portchester and going north to the State line? *A.* Yes, sir.

Q. How many? *A.* Well, I can't recall now the exact number; I know half a dozen, probably.

Q. Name the transactions; designate them by the name of the owner? *A.* Well, there is one farm that a woman by the name of Husted bought; I examined the title.

Q. Where does that lie? *A.* That is on the easterly side of the Byram river.

Q. What did you have to do with that? *A.* I had to examine the title, and consulted her in regard to the amount to pay for it; and there is another farm nearly
455 opposite, called the Dayton farm.

Q. Nearly opposite the Husted farm? *A.* Yes, in that locality.

Q. How far are they above Mr. Pine's? *A.* Well, they are just on the edge of the State of New York.

Q. Way up by the State line? *A.* Yes; it is in the valley of the Byram.

Q. That is how many miles from Mr. Pine? *A.* Six or seven miles.

Q. Have you any farm lands lying nearer to Mr. Pine than those in your mind? *A.* Well, not that I have personal——

Q. Now, in valuing Mr. Pine's land, as I understood you, at $10,000—— *A.* Yes.

456 *Q.* ——tell me what makes up the $10,000; there is land there and there are buildings? *A.* There is about one hundred acres of land; I don't know by exact measurement, but about one hundred and three or one hundred and four, perhaps, and upon that land there is a house, very old, a carriage-house or stable and a workhouse—sort of a workhouse—north of the house, and a barn back in the fields, half-way through the farm, and a mill for

grinding stone; those are about all the buildings; the buildings are old and in poor condition; the house is over one hundred years old, old Revolutionary house. 457

Q. So that you find most of your value there in the land? *A.* In the land.

Q. Bringing the land about $100 an acre? *A.* The land with the buildings and improvements would be worth about $100 per acre.

Q. Is that about the value of farming land in that section? *A.* You can buy the best farms in that section, where the value is for farming purposes, for $100 an acre.

Q. What would be its value for building sites? *A.* It has no value for building sites.

Q. So that you have valued Mr. Pine's farm only for farming purposes? *A.* Yes; it isn't suitable for building sites. 458

Q. Now, why is it not suitable for building sites? *A.* Because it is situated on low ground and that it is not desirable—and particularly along the banks of a stream—is not desirable for a residential purpose.

Q. What is the height of the elevation of the hills along the Byram river embraced in Mr. Pine's farm? *A.* Above what, the river?

Q. Above the river? *A.* Fifty feet.

Q. Are you willing to say that there is no hill on Mr. Pine's farm more than fifty feet? *A.* Well, I don't think there is; still up in the northwesterly corner there might be a point up there on the boundary line of his land that might be a little higher than that, but I don't think there is. 459

Q. Then you are willing to base your estimate of values on that fact, that there is no hill on Mr. Pine's farm that is over fifty feet high above the river? *A* Well, that is my judgment.

Q. And you valued the farm, having in mind that the elevation above the line of the stream was fifty feet? *A.* I had in mind that it was not calculated for building purposes.

Question repeated.

A. Well, I don't know as I went over the farm that I

460 calculated in my mind or estimated the highest point of his land above the river; I don't think I did.

Q. Won't you please answer that question? (Repeated.) *A.* Yes.

Q. Then if the elevations there are more than fifty feet, it would be valuable for residential purposes; is that what you thought? *A.* Well, that would depend upon how much there was of fifty feet, whether there was room enough for a residential site.

Q. Now, I take it, from what you have testified, that you think people do not desire a stream through residential tracts of land; is that your opinion, as a real estate expert, that people generally do not desire a stream? *A.* That kind of a stream.

461 *Q.* What do you mean by "that kind of a stream?" *A.* One that is not navigable, one that you can't use boats on.

Q. Then, as a real estate expert, is it your opinion that people purchasing tracts for residential estates do not desire running, flowing streams of water through them, that they prefer a tract without a flowing stream to a tract with a flowing stream? *A.* Well, that depends somewhat——

Question repeated.

A. Well, they prefer a tract with high ground.

Q. I must ask for an answer to the question, Mr. Banks? *A.* I have in mind this stream more particu-

462 larly.

Q. I asked what was the matter with that stream, and you say it is not navigable. *A.* I say it is not desirable along that stream for residential purposes.

Q. Why not? *A.* It is low, wet land, and with a fog at nights, and people are afraid of malaria and dampness, and it is not desirable; can't sell a man a building lot——

Q. (Repeated) Then, as a real estate expert, is it your opinion that people purchasing tracts for residential estates do not desire running, flowing streams of water through them, that they prefer a tract without a

flowing stream to a tract with a flowing stream? *A.* 463
Well, I think they prefer a tract without a stream of water.

Q. Now, how many times in your experience have you known a case where a gentleman purchasing a country estate has sought one without a flowing stream, and made that a specification? *A.* Well, I know that generally——

Q. No; but how many times in your experience? *A.* As to the number of times, I don't know the number of times; I say generally.

Q. Do you know of any instance in the country where a gentleman purchasing an estate of some acres for his residence will not take it with a running stream upon it? *A.* He might purchase it with a running 464
stream upon it——

Q. Well, do you know of any such case? *A.* Yes, I know of several cases where a person having a running stream will use that stream for water purposes, but not to build a house upon.

Q. Did you ever know of an estate where a stream was sought for purposes of ornament? *A.* Yes.

Q. Then running streams do have value in the minds of purchasers? *A.* Well, an imaginary value.

Q. Then you know more about it than the purchasers? *A.* Well, I have seen the folly of their ways often; spend a great deal of money to give it away afterwards.

Q. So you don't believe in the improvement of coun- 465
try estates? *A.* Well, men spend their money sometimes on them, but it isn't profitable.

Q. But, however, there is a demand for country estates? *A.* Yes, sir.

Q. You mentioned swamp land on Mr. Pine's farm; now, will you please locate it? *A.* Well, I mentioned the northerly part of his farm along the river was more level and not so stony or hilly as the southerly.

Q. Then you didn't mean to refer to it as swampy? *A.* In the southerly part is a marshy spot, and then in

466 the middle or westerly side there is another marshy spot, and a little stream of running water comes out of it.

Q. What is the entire area of that part of Mr. Pine's farm that is too swampy to be used for cultivation? *A.* Well, I don't think there is any of it that is too swampy to be used for cultivation in a farm, for a pasture or mowing.

Q. Did you observe that his entire farm lies above the level of the river? *A.* Yes.

Q. None of it below the level? *A.* Above the level.

Q. Now, you state that you have valued that tract of land as a tract for farming purposes; you didn't take into consideration any other value than that, did you?

467 *A.* No; I didn't consider it would have any other value, except what there is upon the farm.

Q. And that you stated to be what, these buildings? *A.* These buildings; yes, sir.

Q. Anything more? *A.* I think I have stated all.

Q. Well, don't you know, Mr. Banks? *A.* I know the farm; I know what there is on it.

Q. You have stated to me all the elements of value that you found there upon which you place this figure of $10,000? *A.* Well, I think so; I am not sure.

Q. Well, won't you mention any you haven't stated? *A.* I mentioned the buildings and the land; there is an orchard, an old orchard, south of the house, southwest, and the mill for grinding stone, which is taken

468 from this land; some woodland; I think I mentioned everything.

Q. Now, what value did you place on the feldspar deposits in Mr. Pine's land; you placed none, did you? *A.* Well, no; I think——

Q. I don't want that? *A.* I didn't place any specific value; I have had some experience in that.

Q. You stated that Mr. Pine's house was old; did you find the other buildings old? *A.* They are gen-

erally old; the mill, I think, is the most recent build- 469
ing.

Q. About how old is the mill? *A.* Well, I think the mill had been built six or seven years.

Q. And how about the barns; how old would you say they were? *A.* The barn back in the fields is quite old.

Q. Well, how old? *A.* Fifteen years, or twenty years; but the building west of the carriage house, or stable, isn't so old; perhaps seven or eight years; they are not in very good repair.

Q. In valuing Mr. Pine's farm, did you add anything at all for the flowing of this stream through it? *A.* Well, I took into consideration that it was a farm well watered. 470

Q. You added value because of that? *A.* Yes; if there had been no water upon the farm, it would have been worth less.

Q. If there had been more water on the farm, would you have given a larger value to it? *A.* No; I think there is too much now sometimes.

Q. Whereabouts? *A.* At the upper part of the farm; I think in time of freshets, I think that the stream overflows and makes some of the land too wet.

Q. So that your impression is that the Byram river, as you saw it flowing through Mr. Pine's land, is of more advantage to his farm than if there had been an addition to the quantity of the water as you saw it; is that your opinion? *A.* I think that it doesn't affect 471
the value of that farm.

Q. Now, you visited this farm on December 3 and again on December 10, did you not? *A.* I think those were the dates.

Q. How deep did you see the water in the channel of the river, in front of Mr. Pine's land? *A.* In front of Mr. Pine's house it runs swiftly; at the northerly end of his farm and the southerly end of his farm, it is deeper.

Q. How deep is it? *A.* Some places a foot; some places 6 inches.

472 *Q.* In observing the channel of that river, you could distinctly see the channel of the river? *A.* Yes, sir.

Q. You saw the stones? *A.* Yes, sir.

Q. They were not covered? *A.* Not all of them.

Q. Now, if there had been a current of water flowing through there covering those stones and everything to the full extent of the ordinary channel of that river, would not the value of Mr. Pine's farm in your opinion be increased? *A.* I don't think so; I think there is sufficient water for all necessary purposes.

Q. And in your opinion as a real estate expert that would be the opinion of a gentleman purchasing that for the purpose of a residential estate? *A.* I think so.

Q. Now, you spoke of there being some consideration
473 of malaria in regard to streams? *A.* Yes.

Q. Does that in your opinion apply to flowing streams? *A.* Yes.

Q. Does it apply rather to streams that move with a slow current, than with a fast current? *A.* It is not so prevalent with a swift-running stream.

Q. So the swifter the stream runs the better from that point of view? *A.* Yes.

Q. The diminution of the flow of water in a stream retards the current, does it not? *A.* Well, no——

Q. I want an answer to the question?

Mr. Dykman—He is answering it.

474 *A.* Perhaps I didn't understand it.

Q. (Repeated) The diminution of the flow of water in a stream retards the current, does it not? *A.* The diminution? That is the less amount flowing retards the current? Well, I don't know that it does.

Q. Well, would the greater or less quantity flowing down the channel of a river have any effect on these hypothetical malarial conditions? *A.* Well, the less quantity flowing would be less liable to produce malaria.

Q. Now, take it where there are ponds along the river, 475
does the greater or less flow of the water have any effect on the supposed malarial condition? *A.* If the water is ponded——

Q. Won't you answer that; the question calls for only yes or no?

Mr. Dykman—The counsel for the City objects to the constant interference of the complainants' counsel with the answers of the witness.

A. Well, I think it does.

Q. Well, what effect? *A.* If the ponds are standing and there isn't water flowing it is worse.

Q. The less water that flows the more the pond might 476
approach to a condition of stagnation? *A.* Yes.

Q. You noticed a pond on Mr. Pine's land, did you not?

Objected to by defendant's counsel on the ground that it is admitted by the complainants' counsel that there is no pond on the Pine property.

Q. You noticed a pond lying along the edge of Mr. Pine's land, did you not, near his house? *A.* The lower end of his farm, yes.

Q. Then it is true, in your opinion, is it not, that if the City has diminished to a considerable extent the flow of water down the Byram river it has increased the chances of stagnation in regard to that pond? *A.* No. 477

Q. It has not? *A.* There is enough water to fill the pond all the while.

Q. And the pond wouldn't be improved by having more water flowing through it and over its dam? *A.* I think not in that case.

Q. If prior to the diversion of the waters of the Byram river by the City of New York, there was an average of five to seven millions of gallons more per day--and there was a decrease in the flow there from five to seven million gallons per day, you think that

478 Mr. Pine's property is improved by that decrease in the flow of water?

Objected to by defendant's counsel as a statement and not a question.

A. I don't think it is improved by any such state of facts; that is, if that statement is correct; I don't know about that.

Q. Well, I ask you only to assume that if the City of New York has taken a flow of water from the Byram river, amounting to 7,000,000 gallons, which prior to its diversion by the City flowed down past Mr. Pine's property, is Mr. Pine's property damaged or not thereby? *A.* In my judgment his property has not
479 been damaged by reason of the taking of what water has been taken; it has not been increased, however.

Mr. MARSHALL—I ask for an answer to the question.

Mr. DYKMAN—I object; it has been answered.

Question repeated.

A. If I could state, without going on the record, if this 7,000,000 gallons that is taken might take every drop of water that runs in the river, then the farm would be damaged.

Q. You saw the Byram river when you were there? *A.* Yes.

Q. You saw the flow? *A.* Yes, sir.

Q. Could you tell what that flow was in gallons per
480 day? *A.* I could not.

Q. You hadn't any idea? *A.* No; I might have an idea, but I wouldn't want to stake much on my judgment of it; I could tell the flow of the river, but not the number of gallons.

Q. Assume, Mr. Banks, that before the diversion of this water by the City of New York the average flow through the year was 24,000,000 gallons per day, down the Byram river—— *A.* Both branches?

Q. I am speaking of the Byram river, in front of Mr. Pine's property—assuming it was 24,000,000 gallons, and that the City has diverted 7,000,000 or

8,000,000 gallons—one-third of it—is Mr. Pine's property affected in value thereby? *A.* No, sir. 48

Q. For any purpose? *A.* Not for any purpose that I know of at present; or for the future, that I can conceive.

Q. Assuming that the conditions of Mr. Pine's property permit of his constructing a mill pond upon it, would the diversion of this water have any effect then?

Objected to by defendant's counsel on the ground that Mr. Pine at no point owns both sides of the river, the question is a mathematical impossibility.

No answer.

482

Q. What value did you give to Mr. Pine's land in view of the possibility of constructing a mill pond there and securing water power? *A.* I didn't consider that it was feasible or could be done.

Q. Then if it were feasible, it would make a difference in your value, wouldn't it?

Objected to by defendant's counsel on the ground that it is impossible, not feasible.

A. If it were possible to make a pond to store water there, it would increase the value of this property, in my judgment.

Q. And then in that case, if it were possible to make 483
a pond there, the decrease in the flow of the water would be a loss and damage to Mr. Pine as a land owner, would it not? *A.* Oh, this quantity of water that is diverted I don't think affects it at all——

Q. That isn't the question—— *A.* I can't realize how it is possible.

Q. (Repeated.) Then in that case, if it were possible to make a pond there, the decrease in the flow of the water would be a loss and damage to Mr. Pine as a land owner, would it not? *A.* Yes.

Q. How do you apportion the value $10,000, between

484 the land and the buildings there? *A.* Well, I can't very well separate one from the other.

Q. As a real estate expert you can't separate unimproved land from improved?

Mr. DYKMAN—I object, on the ground that it has been held that a division of an estimate of that kind is illegal and improper.

Q. Can you, as an expert, apportion your estimate between the improvements and the vacant land?

Mr. DYKMAN—Objected to on the ground that the word "improvements" is too remote; what do you mean?

Mr. MARSHALL—Buildings.

485 Mr. DYKMAN—What buildings?

A. Well, the buildings wouldn't be worth anything, if they had to be sold and taken away; they add to the value of the property, but to separate one from the other, it is impossible to arrive at any just and fair conclusion.

Q. Then as a real estate expert you say that you cannot tell me what proportion of the $10,000 you allow for the value of buildings on Mr. Pine's farm? *A.* No; I can't separate it in dollars and cents.

Q. But a little while ago you told me your idea of the value of land on King street without buildings? *A.* Yes, some land.

Q. Now, why can't you tell me the value of Mr.
486 Pine's land without its buildings? *A.* Well, I might in my judgment—I might form an estimate of what the property would be worth without improvements; about fifty per cent. less.

Q. A while ago you told me your value of farm lands there was $100 per acre? *A.* Including buildings; buildings suitable for a farm.

Q. So that you would allow here about $5,000 for the land and $5,000 for the buildings? *A.* If I had it separate I think the improvements on the farm add about fifty per cent.

Q. Now, you saw that feldspar mill when you were there? *A.* Yes.

Q. You found it in operation? *A.* Yes, sir. 48

Q. What is the cost of that building, can you tell me? *A.* What it did cost?

Q. What you think it would cost to build, as it is there? *A.* The building itself?

Q. Yes. *A.* In its present condition?

Q. What it would cost to build, as you see it there now? *A.* Well, I don't know what it would cost to build.

Q. What it would cost to build? *A.* It has been built a number of years.

Q. How many years? *A.* Perhaps five or six, six or seven; $1,000.

Q. And are you willing to state as a real estate expert that that building could be constructed for $1,000? 48
A. Well, the wear and tear would be something for it.

Q. What could you build the building for as it stands now, a new building? *A.* Well, a new building would be worth twenty-five per cent. more than this one.

Q. That would be $1,250 new? *A.* Yes, sir.

Q. Now, give me the size of that building; you measured it? *A.* Well, I measured it in—not accurately.

Q. What was your idea? *A.* I made a little memorandum, but I can't recollect without referring to it.

Q. Well, was it five feet square, or ten, twenty, thirty or forty; I want the basis of your estimate; you valued it at about $1,250; Now, I want the size? *A.* 489
You are asking me now to separate my estimate——

Q. Well, give me your idea of the size of that building, on which you have testified as to the value of the property? *A.* The main building, which is the westerly part of it—I call that the main building—I think is about thirty by forty; that is a two-story building, with a tar-paper roof; and there is an addition to that, one-story addition, on the westerly end, across the end of it—the front of the building, towards the east or towards the river—runs across the front of the main

490 building and projects beyond; I think that is probably forty feet in length, north and south, and about twenty feet in depth, east and west; joins on in the shape of an L to the other building, the main building; that is a two-story building on one part, the easterly part, and seems to be a story or a story and a half, as we call it, on the west; it isn't all in one building; it is built separately, one part for the machinery—that is the engine and boiler—and another part for the grinding of the stone; then there is a stone crusher outside that is run from a belt to the machinery in this mill.

Q. Is that a building? *A.* No, sir.

Q. I am asking about the building; two buildings? *A.* They join together.

491 *Q.* And you think buildings of that size and the conditions you have described could be built new for about $1,250? *A.* I think so; just a frame shell.

Q. Well, give the height in feet? *A.* Well, perhaps twenty feet.

Q. Do you know how many feet of lumber it would take to construct those buildings? *A.* I do not.

Q. Have you any idea of the mere cost of lumber in those buildings? *A.* I never have had experience in building just such buildings as that; I have built barns and carriage houses and houses of all kinds, but I couldn't tell without calculation.

Re-direct examination:

492 By Mr. DYKMAN:

Q. Speaking again of the Pine property, how close to the road is the river in front of the house? *A.* The nearest point, as I recollect, is about in front of the house, where the bridge crosses over from the road, and it was twenty or twenty-five feet.

Q. You came from the highway over the river on a bridge to get into Mr. Pine's house? *A.* Yes, sir.

Q. Then as you go north from that bridge the road

is close to the river for quite a distance? *A.* Yes, it runs close to the river quite a little distance above. 493

Q. And the river is lower than the highway? *A.* Yes, sir; then as you get a little above, the road leaves the river a little to the east a little further, but nearly parallel with the river up that valley.

Q. Now, your attention has been called to King street property; how does the property in King street compare with property in this valley? *A.* The farms as a rule are better farms; you mean lower King street, near Portchester?

Q. Yes? *A.* Oh, they are worth some of them ten times as much; they are higher and have a view of the Sound; and the upper end of King street, being further from the railroad, is worth less than the lower end. 494

Q. Now, compare the upper end of King street, where you can see the Sound, with this property down in this hollow, how do they compare? *A.* They are more desirable; they are better farms, better land.

Q. So far as residential purposes are concerned? *A.* Better for residential purposes.

Q. Bring more money? *A.* Bring more money than farms along the valley of the Byram river.

Q. They are occupied, a great many of them, by people of means? *A.* Yes, sir.

Q. And handsome places been built? *A.* Yes, sir.

Q. Up on the high ground, where you can see Long Island Sound? *A.* Yes; Whitelaw Reid and Trenor Park, and Walter W. Law's; several farms. 495

Q. And the Brooks' place? *A.* And Marion Story and O'Callaghan, the President of the Mutual Bank.

Re-cross examination:

By Mr. MARSHALL:

Q. I understood you to say that land on King street was worth ten times as much as you had testified to the value of land in this Byram river valley? *A.* Some of it.

Q. As this farming land of Mr. Muller's? *A.* Yes.

496 *Q.* Is that for the land alone? *A.* For the land alone.

Q. Then if you allow $50 per acre in the Pine tract you get a valuation of ten times that on King street? *A.* I priced some last summer for a party on King street, and they wanted $500 an acre for it.

Q. Is the fact that you can see the Sound from these villa sites of advantage to the sites? *A.* Yes.

Q. Why? *A.* It adds to the value to a great extent.

Q. Well, why? *A.* Well, being on high ground overlooking the water and the Sound.

Q. The view? *A.* Yes, sir.

Q. With the incident of water in the view? *A.* Yes.

Q. Do you confine that to the Sound; don't you
497 allow that to other streams or bodies of water? *A.* I might to lakes.

Q. You wouldn't allow it to an inland stream that was in full view from your doorway then? *A.* I wouldn't allow it to a stream such as I have in mind.

Q. I ask for an answer to the question? *A.* I have in mind streams of this character, several of them in my mind; I own a place now near one of them, I find it difficult to sell it on account of the low ground on the stream.

Mr. MARSHALL—I object; you are not answering my question. I move to strike out the answer as not being responsive to the question.

498

Q. (Repeated) You wouldn't allow it to an inland stream that was in full view from your doorway then? *A.* I wouldn't allow it to streams of this character, the character of the Byram river or the Bronx or streams of this character.

Q. Now, Mr. Banks, why would you not allow some element of value to property which commanded a view of a flowing stream, such as you saw the Byram river to be? *A.* Because flowing streams are in low ground invariably; you get no

view from your property; the view of the stream running, perhaps, but it isn't desirable. 499

Q. Then I understand that you, as an expert, say that you do not allow any element of value to property because it commands a view of a flowing stream like the Byram river? *A.* The Byram river doesn't add to its value; no, sir; on the contrary.

WM. L. BANKS.

Subscribed before me
March 30, 1900.

JAMES A. RENWICK,
U. S. Examiner.

Adjourned to Thursday, December 28, 1899, at 10.30 A. M. 500

NEW YORK, January 4, 1900.

Met pursuant to adjournment.

Appearances—Mr. MARSHALL and Mr. WILLIAMS for the plaintiff; Mr. DYKMAN for the defendant.

WILLIAM H. HOYT, called as a witness on behalf of the defendant, was duly sworn, testified as follows:

Direct examination: 501

By Mr. DYKMAN:

Q. Mr. Hoyt, where do you reside? *A.* Tarrytown, New York.

Q. And your occupation is what? *A.* Real estate dealer and agent.

Q. Where is your office? *A.* No. 5 Vanderbilt avenue, in the City of New York.

502 *Q.* Have you any branch office? *A.* Branch office at Tarrytown.

Q. How long have you been engaged in the real estate business? *A.* Thirty-one years.

Q. And during that time have you bought and sold real estate in Westchester County? *A.* I have.

Q. Have you property on your books now for sale in Westchester County? *A.* I have.

Q. And in what other parts of the country north of the Harlem river? *A.* On the line of the New Haven Railroad from New York to New Haven, on the line of the Hudson River road to Albany, on the West Shore road to Kingston and on the Harlem for its entire length.

503 *Q.* How many pieces of property have you now on your books for sale of various kinds, including farm property? *A.* Approximately about four thousand.

Q. At what places in the State of Connecticut have you property for sale? *A.* I have nearly every town on the line of the New Haven road and some of its branches.

Q. And during your experience as a real estate agent have you been called upon to appraise property? *A.* I have.

Q. Have you acted as a real estate expert in condemnation proceedings? *A.* I have.

Q. Do you know the New York and Northern Railroad? *A.* I do.

504 *Q.* Were you connected in any capacity with the condemnation proceeding or the acquisition of the right of way? *A.* Securing the right of way.

Q. On whose behalf? *A.* On behalf of the railroad.

Q. Were you connected with the condemnation proceeding in the Croton Aqueduct, New York? *A.* I was.

Q. As an expert witness? *A.* Yes, sir.

Q. As to value, etc.? *A.* Yes, sir.

Q. On whose behalf? *A.* On behalf of the property-owners.

Q. And you have been employed, have you not, by the City of New York in various cases? *A.* I have.

Q. Do you know the Pine property in question? *A.* I do.

Q. How long have you known that section of the country, generally speaking? *A.* About twenty-five years.

Q. Have you recently made an examination of the Pine property? *A.* I have.

Q. When? *A.* I think it was one day last week, I forget the day that I was specially there.

Q. Who showed you the lines of the property? *A.* Mr. Banks.

Q. Who did you see on the property? *A.* I saw no one except an employee, a man who couldn't understand English; Mr. Pine was not there.

Q. How many acres do you understand that farm contains? *A.* Contain 100 acres. 506

Q. You can use any memorandum you made? *A.* It is supposed to contain, or is reported to contain, 100 acres.

Q. Did you look it over? *A.* I did.

Q. What class of farm is it? *A.* It is an ordinary farm for that section of the country; it is what I regard as a rough farm.

Q. What do you mean by a rough farm? *A.* I mean that the predominant acres of the farm are very rough pasture and woods.

Q. How many sides of the river do you understand Mr. Pine owns? *A.* On one side.

Q. What road front has he? *A.* He has no road front except by right of way over the bridge across the river. 507

Q. You leave his property and go over a bridge to get to the highway? *A.* Yes, sir.

Q. Did you see the Muller property? *A.* I did.

Q. Did you see the point where the West Branch of the Byram meets the East Branch? *A.* I did.

Q. How many acres did you understand there to be in the Muller farm? *A.* 44 acres, so reported.

Q. What class of farm do you term that, sir? *A.* That I regard as a very good farm; principally the majority

508 of the farm is meadow and bottom, also tillable land, about five acres of wood and rough pasture.

Q. Does the Pine farm compare favorably with the average farms throughout that section, the section of Westchester County immediately west of it. *A.* It does not.

Q. You know where King street is, do you not? *A.* I do.

Q. How does it compare with the property immediately west of it on King street? *A.* It is not comparable.

Q. Why not, sir? *A.* Because of the topography of the land, the quality of the land and the class of improvements and the neighborhood generally.

509 *Q.* The street known as King street has been referred to in the trial of this case and property has been said to be held at high prices; how much below King street is the Byram river at this point approximately?

Mr. MARSHALL—I object to that. He is not an expert on grade lines.

A. I should say from seventy-five to one hundred feet.

Q. Is the section of the Byram country, as I term it, near the Pine property improved? *A.* No, sir.

Q. It is stated here that the City of New York has diverted a portion of the waters of the West Branch of the Byram river; this action has been commenced to
510 obtain an injunction restraining the defendant from diverting portions of the waters of the West Branch of the Byram river; what difference, if any, in your opinion, Mr. Hoyt, does the diversion of the waters of the West Branch of the Byram river make in the value of the property in question? *A.* So far as I can judge it makes no difference.

Q. Did you notice the flow of the East Branch of the Byram river? *A.* I did.

Q. Generally speaking what quantity of water did you see there as compared with the necessities of this farm?

Mr. MARSHALL—I object upon the ground that it has not been shown that he knows the necessities of this farm.

Q. Mr. Hoyt, how many farms have you examined in your lifetime? *A.* It would run into a good many hundreds.

Q. Do you know the necessities of a farm so far as water is concerned? *A.* I think I do.

Q. You have been called upon, have you not, to value farms where streams ran through them? *A.* I have.

Q. And where cattle have been kept? *A.* Yes, sir.

Q. And do you or do you not know the quantity of water necessary for a farm for farming purposes? *A.* I think I do.

Q. Now, will you answer the question? (Question read.) *A.* There is a great abundance of water, a great surplus of water, so far as the necessities of the farm is concerned.

Q. Now, assuming that the East Branch of the Byram river is in no way diverted by the City of New York, and that this farm has for its advantages and purposes all the waters of the West Branch of the Byram river, what difference, if any, in the value of this farm would there be? *A.* I don't think there would be any difference.

Q. What, in your opinion and from your experience, is the market value of this property? *A.* You are speaking of the Pine property now?

Q. Yes, sir. *A.* $9,000, or $90 an acre.

Q. How far is this farm from the nearest railroad station? *A.* It is about four miles from Port Chester, and about the same distance from Greenwich.

Q. Does the farm give evidence of having been kept up in a good state of cultivation? *A.* It does not.

Q. Is it what you would call an expensive or cheap neighborhood where the farm is located? *A.* It is a cheap neighborhood.

514 *Q.* What use was made of the water from the Byram river that you saw? *A.* So far as I could examine and ascertain, the waters of the Byram river could be used, but as I understand were not used generally, for stock purposes; that the only direct use made of the Byram river was to supply a boiler which furnished the power for a stone crusher which is upon the property, and the water is conveyed from the Byram river into a tank or reservoir and pumped from there into the boiler.

Q. To what extent is water valuable to a property of this kind, either the Muller or the Pine property? *A.* To the extent that it can be utilized for whatever purpose required or adapted to.

Q. Now take the Muller property, what sum did you
515 value that? *A.* $6,600.

Q. I repeat the question to you in relation to the Muller property that I asked you as to the Pine property; what difference in value, if any, has been caused by the City diverting the waters of the West Branch of the Byram river. *A.* The market value?

Q. Yes, sir? *A.* I think no difference.

Q. Is there, in your opinion, from what you have seen, water enough to supply all the needs of the farm for the use of cattle? *A.* Abundance of water and for forty more farms like it.

Cross-examination:

516 By Mr. MARSHALL:

Q. How much water has been diverted from the Byram river in front of Mr. Pine's property? *A.* In point of gallons, I could not say; I would only know as to——

Q. I did not ask the reasons; when you testified that the diversion makes no difference you testified without knowing what the diversion has been, did you or did you not? *A.* No, sir; I say——

Q. You say no you do not, is that your answer?

Counsel for the City demands that the witness be allowed to continue and complete his answer.

Mr. MARSHALL—I object to his answer being anything 517
but yes and no; I submit that no witness has a right on cross-examination to give anything but a yes or no answer to a yes or no question.

Q. When you testified that the diversion made no difference, so far as you could judge, did you or did you not know what the diversion had been? *A.* Only by what I——

Q. I ask you whether you did or did not know what the diversion had been? *A.* Personally, I did not.

Q. If you did not know personally, how did you know? *A.* I know by information I believe to be true.

Q. What is the information? *A.* The information was that the report of the engineers was that about 518
one-quarter of the water from the Byram Pond was diverted.

Q. How much water was there from Byram Pond? *A.* I don't know, sir, in gallons.

Q. How much water does Mr. Pine get below the junction of the stream? *A.* I don't know, sir, in gallons.

Q. Assume both the East and West Branch of the Byram river to be diverted, is there any damage sustained to Mr. Pine, in your opinion?

Mr. DYKMAN—Objected to, on the ground that both the East and West Branch are not diverted, that it assumes a state of affairs to exist that does not exist and is a mathematical impossibility, and was so at the 519
commencement of this action.

A. To be entirely diverted, certainly.

Q. Now, assuming a farm of about 100 acres through which there is flowing a stream of water from 10 to 25 feet in width, assume that all the water from that stream is diverted, is the farm damaged in your opinion as an expert? *A.* In my judgment it would be; I wish to qualify that by saying that this stream does not go

520 through the Pine farm; it goes on the borders of the Pine farm.

Q. Assume a farm of 100 acres with a stream of water 10 to 25 feet wide flowing along its edge, the owner owning to the middle of the stream, in your opinion if that stream is entirely diverted, is the farm damaged? *A.* I think it would be.

Q. If it is diverted to the extent of one-half, is it damaged? *A.* That would depend entirely upon the uses to which the water is put and the demand for it.

Q. Would it depend upon only the actual uses to which the water was put? *A.* Not the present uses of that farm; I don't mean——

Q. (Repeated). *A.* In my judgment that would be
521 the--all the uses that I could ascertain would be its present use.

Q. Won't you answer that? (Repeated.)

Mr. DYKMAN—That it objected to; the question has been answered.

Q. I want an answer to that question.

Mr. DYKMAN—I object to any further statement of counsel to the witness. The question has been answered.

Q. (Repeated) Do you understand the question? *A.* I think I do; I think I answered it, but, however, I
522 will answer it again; it would depend upon the uses and adaptation of the water to the farm——

Mr. MARSHALL—I will enter an objection right here.

Q. (Repeated). *A.* In my judgment it would.

Q. You would not then take into consideration the possibilities of the owner of such a piece of real estate wishing to use the water in a more expansive way than he was at the time you examined it? *A.* I might consider it.

Q. You would consider that? *A.* Yes.

Q. Then your opinion on that point would depend very largely upon what the owner thought? *A.* On what the uses of the water was practically adapted to that property. 523

Q. Did you take into consideration the fact, in reaching your statement, that there was no damage here—did you take into consideration the fact the owner might or might not make a mill pond there, or as to whether he could or could not?

Mr. DYKMAN—That is objected to on the ground that Mr. Pine only owns on one side and the construction of a dam would be impossible.

A. I took into consideration that he could not create a mill pond on his present ownership. 524

Q. Assume that the statutes of Connecticut give him the power to flood the lands adjoining by the taking of proper legal proceedings, would the stream and the quantity of water in it then affect the value? *A.* Certainly it would under those circumstances.

Q. Have you in your long experience as a real estate broker ever had parties in purchasing tracts of land in the country districts insist that there should be running streams of water through them? *A.* Oh, yes, sir; many times.

Q. Can you see the Long Island Sound from the elevation of Mr. Pine's farm? *A.* There is on the southwest portion of the Pine farm a point where you can see the Sound. 525

Re-direct examination:

By Mr. DYKMAN:

Q. Was that considered by you in forming an estimate of the Pine property? *A.* Every element I know of was considered.

Q. If the statutes of Connecticut permit the acquisition by the owner of real property for the purpose of building a dam, what part of Mr. Pine's property would be flooded, take the dam 20 feet high, for instance?

526 Mr. MARSHALL—I object on the grounds that the witness is now shown to be an engineer, or capable of judging elevations or flowage of water.

A. That would depend upon where the dam upon Mr. Pine's property is erected.

Q. How far above the level of the river, as near as you can gauge by your eye, is this house? *A.* I should say about not to exceed 6 feet.

Q. Then along the western bank of the river as you go north toward the Muller property, what is the topographical situation of the Pine meadows?

Mr. MARSHALL—Objected on the ground the witness is not an engineer and not competent to judge of the
527 elevation.

A. The Pine meadows, so far as meadows are concerned, do not reach the river beyond the stone crusher; the location of the mill known as the stone crusher, immediately beyond the property, becomes quite abrupt on its banks, rough and somewhat precipitous, so it would not flood any meadows by raising a dam 15 or 20 feet on the Pine property, to any extent; it might possibly back up a little; while on the other side of the river it would flood the highway.

April 2, 1900.

WILLIAM HOYT.
By JAMES A. RENWICK,
528 U. S. Examiner.

CHARLES L. AUSTIN, called as a witness on behalf of the defendant, was duly sworn, testified as follows:

Direct examination:

By Mr. DYKMAN:

Q. Mr. Austin, where do you reside? *A.* Port Chester, New York.

Q. What is your occupation? *A.* Real estate dealer.

Q. With your office at Port Chester? A. Yes, sir. 529
Q. You are acquainted with the Byram valley? A. Yes, sir.

Q. And with the Pine property? A. Yes, sir.
Q. Muller property? A. Yes, sir.
Q. And you have examined them recently? A. I have.

Q. And you have been advised, have you not, that a portion of the waters of the West Branch of the Byram river have been diverted by the City of New York? A. I have.

Q. When you were examining the Pine property and the Muller property did you see any water flowing down the Byram river? A. I did.
Q. Generally speaking, to what extent and in what 530
quantity as compared with the necessities of the farm?

Mr. MARSHALL—I object until you show he knows the necessities of the farm.

Q. How large a stream did you see? A. A large stream.

Q. How wide, going by the Pine farm; just take it at the bridge there? A. Oh, I should judge 15 feet wide, anyway.

Q. And how deep? A. Well, it would vary from an inch to five or six inches; maybe more in some places.
Q. A rapid or a sluggish flow? A. A good flow.
Q. In your judgment, how is the property affected
for the uses of a farm? A. Plenty of water there, in 531
my opinion, for all farm purposes.

Cross-examination:

By Mr. MARSHALL:

Q. You say there was plenty of water there for all farm purposes? A. Yes, sir.
Q. That would depend upon what the farm purposes were, would it not? A. I hardly think so.
Q. What would it depend on if it would not depend

532 on what the farm purposes were? *A.* I think for any farm purpose it could be used, for there would be more than enough water to equal the demand.

Q. How about its affecting the possibilities of the location of a mill pond upon the farm?

Mr. DYKMAN—Objected to on the ground that he only owns on one side of the river and has never acquired any right to build a dam or a reservoir, and must treat the property as described in the complaint in this action.

A. In my opinion, I don't see how they could have a mill site there, only owning on one side of the river.

533 *Q.* You are not an engineer, are you? *A.* No, sir; I am not; I don't qualify as such.

Q. You are not a lawyer? *A.* No, sir; I am not.

Q. You are not familiar with the statutes of Connecticut with regard to the flowage of land, are you? *A.* Well, I was looking over the farm, and Mr. Johnson informed me they had the right, according to the laws of Connecticut, to overflow their neighbor's property.

Q. But you have never been called upon to value property with reference to the statutory rights of the State of Connecticut? *A.* No, sir.

Q. The one inch to five inches of water in that stream was of value to the farm? *A.* Yes, sir.

Q. Would from ten to twelve inches have been of

534 more value? *A.* For farm purposes?

Q. No; I simply ask would it be of more value for any purpose? *A.* It might be in some instances.

Q. In what instances would not ten to twelve inches be of more value? *A.* If he has sufficient for all his purposes with five inches, I don't see how ten inches is going to benefit him.

Q. How about future purposes?

Mr. DYKMAN—Objected to as too remote and too indefinite.

A. If he has future purposes that he could use, it would be more benefit to have more water; there might be such a case. 535

Q. Which would you rather have, a tract of land with a stream twenty feet wide, with one to five inches of water, or a stream twenty feet wide, with from ten to twelve inches, with a rapid flow increased by the quanity of water? *A.* Why, the more water—I should say the more water there was the more value.

Q. You never visited this property in the summer time? *A.* Yes, I have been by it many times.

Q. Do you live there? *A.* I drive around there.

Q. Your business takes you through there, in connection with real estate? *A.* Yes, sir.

C. L. Austin. 536

Subscribed to before me
April 10, 1900.

James A. Renwick,
U. S. Examiner.

J. Henry Clark, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination:

By Mr. Dykman: 537

Q. Mr. Clark, where do you reside? *A.* I reside in the Town of Rye.

Q. How near to the Byram river? *A.* Well, the nearest part is about half a mile.

Q. How long have you known the Byram river, in the neighborhood of the Pine and Muller property? *A.* About sixty years.

Q. And do you know the East Branch? *A.* Yes, sir.

Q. You do not own any property on the Byram river, do you? *A.* No, sir.

Q. And your occupation is what? *A.* Farmer.

538 Q. Do you know the Pine property? A. Yes, sir.

Q. And the Muller property? A. Yes, sir.

Q. Have you recently examined the Pine property? A. Day before yesterday, I think.

Q. Did you notice the Byram river? A. Yes, sir.

Q. For how many years have you noticed it? A. About sixty years, I suppose; as long as I can remember.

Q. Have you noticed it within the last three or four years? A. Oh, yes; I have been up that street probably twenty times during the course of the year.

Q. When did you last look that property over? A. Well, I was up there on that farm day before yesterday.

539 Q. What kind of a farm is it, what you call a first-class farm? A. Well, it is a fairish sort of farm; it is pretty rough.

Q. Did you see any water flowing by it? A. Oh, yes, plenty of water by it apparently.

Q. Did you notice the Muller property? A. Yes.

Q. Any water flowing by that? A. Yes, sir.

Q. Did you see the point of intersection of the East and West Branch? A. Yes, sir.

Q. Any water coming down the West Branch of the Byram river when you were there? A. Yes, sir.

Q. How much? A. I should judge very near as much as the East Branch.

Q. When you saw that property was there water
540 enough there for all ordinary household, domestic and farm uses on these two properties? A. Plenty of it.

Q. More than could be used on the property? A. More than could be used for farm uses; enough water there, I should judge, to water 500 head of cattle flowing down that river now.

April 2, 1900.

I. Henry Clark,
By James A. Renwick,
U. S. Examiner.

Counsel for the City states that the evidence on 541
behalf of the defendant being practically completed, he will forward to counsel for the plaintiff a statement of the comparative levels of the Byram river and King street, and will close his case one week from to-day.

Hearing adjourned until Thursday, January 11, 1900, at 2 P. M.

NEW YORK, March 1, 1900.

Met pursuant to adjournment.

Present—The EXAMINER; Mr. MARSHALL and Mr. 542
WILLIAMS, for plaintiffs; Mr. DYKMAN, for defendant.

GEORGE W. BIRDSALL, recalled as a witness on behalf of the defendant, having been previously duly sworn, testifies:

By Mr. DYKMAN:

Q. Mr. Birdsall, what wards in the City of New York are supplied by water from the Bronx, Byram and Rye Ponds?

Objected to by Mr. Marshall upon the ground that it is immaterial, incompetent and irrelevant. 543

A. Portions of the Twenty-third and Twenty-fourth Wards of the City of New York.

Q. About how many persons are dependent upon that supply for their water?

Same objection.

A. About 125,000 people.

Q. What relative proportion of the supply for these

544 125,000 people is furnished by the waters of the Byram river?

Same objection.

A. About seven-twentieths.

Q. What fire protection is there in the Twenty-third and Twenty-fourth Wards, or rather in that part of those wards which is supplied by this water supply other than the Bronx, Byram and Rye Ponds supply?

Same objection.

A. Well, I can only say that seven-twentieths of it.

Q. Take the Twenty-third and Twenty-fourth Wards;
545 a certain portion of those wards are supplied solely by this supply? *A.* No; that is, you are talking of the Byram?

Q. No; by this supply I mean by the Bronx, Byram ——*A.* Oh, yes; certainly.

Q. Well, take those portions of those two wards that rely entirely on the Kensico, Bronx, Byram and Rye Ponds supply, what fire protection is there other than this supply in question for those wards?

Same objection.

A. None at all.

GEORGE W. BIRDSALL.

Subscribed before me }
March, 1900. }
546

JAMES A. RENWICK,
U. S. Examiner.

Defendant rests.

GEORGE W. BIRDSALL, recalled by plaintiffs' counsel:

By Mr. MARSHALL:

Q. Mr. Birdsall, at the session of May 5, 1899 (p. 59 of the minutes), there were two dams referred to

at this Byram Pond or Lake; will you state what two dams you referred to in your testimony there; describe them? *Q.* You see, this is another dam; on the Byram river, about seven hundred feet north of the Connecticut State line, a dam has been placed across same for diverting the waters of the Byram river through a tunnel into the Kensico Reservoir, that is the Bronx river supply; in order to conserve the waters of the Byram river above this dam, it became necessary to build another dam across the river just about four hundred feet below Byram Pond, which forms a storage reservoir; all of the water passing through this dam or drawn from this storage reservoir passes down the Byram river to the lower dam; thence either over the dam to the lower Byram river or through the tunnel to the Kensico Reservoir. 547 548

GEORGE W. BIRDSALL.

Subscribed before me, }
March, 1900. }

JAMES A. RENWICK,
U. S. Examiner.

Case closed.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss.:*

I, James A. Renwick, an examiner in equity, duly appointed, qualified and sworn in the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing depositions of Samuel Pine, Frederick Muller, George W. Birdsall, Edwin A. Knapp, Daniel M. Griffin, Lawrence B. Jenckes, Newton S. Johnson, Samuel Vail, Fred. K. Betts, Nathan J. Hughes, William L. Banks, William H. Hoyt, Charles L. Austin, J. Henry Clark, witnesses produced on the part of the complainants and the defendant, were taken before me 549

550 in the cause in the caption named, under and pursuant to the Sixty-seventh Rule of the Supreme Court of the United States in equity as amended; that the parties to the said cause were present at the taking of the same, complainants by their counsel, Stephen G. Williams, Esq., and the defendant by its counsel, Henry T. Dykman, Esq.; that before testifying, the said witnesses were by me duly sworn to testify the truth, the whole truth and nothing but the truth in the cause aforesaid; that the depositions were reduced to writing from their statements, and the same subscribed and sworn to before me, except where the witnesses after due notice, failed to appear and sign their depositions, in which case, the same has been signed by
551 me, as therein appears.

And I do further certify that I am not an attorney nor of counsel for any of the parties in said deposition or caption named, and am in no wise interested in the result of this suit.

In Testimony Whereof, I have hereunto set my hand, at New York, N. Y., on this 13th day of April, 1900.

JAMES A. RENWICK,
U. S. Examiner.

552

CIRCUIT COURT OF THE UNITED STATES 553

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendants.

In Equity.

554

It is hereby consented that Complainants' Exhibit No. 1 of October 26, 1899, and Complainants' Exhibit No. 2 of October 26, 1899, being each a photograph of the Byram river, and Complainants' Exhibit No. 1 for identification, May 5, 1899, and Complainants' Exhibit No. 2, May 5, 1899, the same being a map of the portion of the State of Connecticut, be not reproduced and the copies thereof be not served by either party on the other, but that the filing of the same and the production of the same at the final hearing before the Court shall be sufficient.

Dated New York, May 4, 1900.

MORAN & WILLIAMS,
Solicitors for Complainants. 555

JOHN WHALEN,
Solicitor for Defendants.

Indorsed:

Circuit Court of the U. S. for the Southern District of New York. In Equity. Samuel Pine & Fredk. Muller, Complainants, *vs.* The Mayor, Aldermen and Commonalty of the City of New York, Defendants. Consent and rule to filing and producing certain exhibits without reprinting and serving same. Moran & Williams, Solicitors for Complainants, 30 Broad street, New York City (Manhattan). U. S. Circuit Court. Filed May 7, 1900. John A. Shields, Clerk.

556 UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendants.

In Equity.

557

We hereby consent that the two letters of which the following are copies, be printed and made part of the case on appeal herein.

FRANCIS M. SCOTT,
Counsel to the Corporation.

MORAN & WILLIAMS,
Complainants' Solicitors.

NEW YORK CITY, May 28, 1896.

558

PINE & MULLER
vs.
THE MAYOR, ETC., OF NEW YORK.

DEAR SIR—I feel that in justice to my clients and to the Court, that it is no less than my duty to inform you that I yesterday, Wednesday, May 27, 1896, saw water flowing through the outlet which diverts the waters of the Byram river. The water was running

through the channel built for it, which is, in my opinion, at least nine feet wide to a depth of at least twelve inches. 559

I am informed and can produce affidavits to verify my information, that the water-way was opened on Saturday, May 23, and has been continuously open from that time.

In view of the argument of the Corporation Counsel that the City authorities had no intention to divert the water for some time to come, and in view of the affidavit of George W. Birdsall, the latter part of folio 3, "It is not the intention of the City authorities to make use of this dam for a long time in the future, at least not for one year. When completed it is proposed by means thereof to divert a part or all * * *." 560

It has seemed to me no more than courteous to send a copy of the foregoing letter to the Corporation Counsel. I am sending him one by the same mail as this. I inclose herewith copy of such letter.

Very respectfully yours,

(Signed) STEPHEN G. WILLIAMS.

Honorable HOYT H. WHEELER, Judge,
Post-office Building,
New York City.

561

NEW YORK, May, 1896.

PINE & MULLER *vs.* MAYOR, ETC.

Honorable HOYT H. WHEELER, Judge, United States Circuit Court, Brattleboro, Vermont.

DEAR SIR—Mr. Stephen G. Williams, of counsel for the plaintiffs in this suit, has forwarded me a copy of a letter addressed to you, dated May 28, 1896, to the effect that the defendants were already diverting water from the Byram river.

562 I have ascertained from Mr. Birdsall, Chief Engineer of the Croton Aqueduct, that the following are the facts:

During the winter there were several heavy freshets in the locality which washed away the temporary dam built to keep the water back so that the laborers could work on the foundation of the permanent dam. The ground in the vicinity is swampy, and when, as at present, there is an abundance of water, it spreads over a large area.

In order to enable the workmen to rebuild the temporary dam a part of the water of the river has been diverted temporarily into the artificial channel leading
563 to the Bronx river.

This diversion will continue only until the temporary dam can be completed, that is, for a period of about two weeks.

In the meantime no possible injury to the plaintiffs can result. The only effect of the diversion is that the quantity of water running past their premises is slightly less than it otherwise would be. There is still an abundance of water for their use.

Very respectfully,

(Signed) FRANCIS M. SCOTT,
Counsel to the Corporation.

564

Indorsed:

United States Circuit Court, Southern District of New York. In Equity. Samuel Pine and Frederick Muller, Complainants, against the Mayor, Aldermen and Commonalty of the City of New York, Defendants. Consent to enter Letters. Moran & Williams, Complainants' Solicitors. Stephen G. Williams, of Counsel, No. 45 Exchange place, New York City. U. S. Circuit Court. Filed October 16, 1896. John A. Shields, Clerk.

QUIT CLAIM DEED.

GILLESPIE BROS., Printers and Stationers, Stamford, Conn. 565

Know all men by these presents, that I, James Pine, of the town of Rye, County of Westchester and State of New York, for the consideration of One Dollar and other good and valuable considerations received to my full satisfaction of Samuel Pine of the town of Greenwich, County of Fairfield and State of Connecticut, do by these Presents remise, release and forever Quit Claim unto the said Samuel Pine all right, title, interest, claim and demand, whatever, which I the said Releasor have or ought to have in or to ALL that certain tract, piece or parcel of land situated in said town of Greenwich and State of Connecticut, with dwelling house, barn and other buildings and improvements 566 thereon, containing one hundred and six (106) acres, be the same more or less, bounded northerly by land formerly of James Wilson, deceased, now of Emmeline Sutton, westerly by land formerly of said James Wilson, deceased, now of said Emmeline Sutton in part, and in part by land formerly of said James Pine and land of estate of the late William Moshier, deceased; southerly by land of estate of said William Moshier, deceased, and land in the possession of William H. Craft, and Easterly by Byram River, being the same premises purchased by me from the heirs of Erastus Rundle, deceased, in or about the year 1870. Hereby reserving and excepting, however, from and out of the property and privileges hereby conveyed the whole 567 use, income and profits of the same for and during the term of my natural life, and the said Samuel Pine is to pay all the taxes and assessments and make all necessary improvements on said property during my life. Reserving and excepting also for the term of my natural life all rights to damages or compensation that may arise or become due for any taking of or injury to my riparian rights in or to said Byram River.

588 To have and to hold the premises, with all the appurtenances, unto the said Releasee his heirs and assigns forever so that neither I the said Releasor nor my heirs, nor any other person under me or them, shall hereafter have any claim, right or title in or to the premises, or any part thereof, except as above reserved and excepted, but therefrom I and they are by these presents forever barred and secluded, except as above reserved and excepted.

In Witness Whereof I have hereunto set my hand and seal the 31st day of May, A. D. 1888.

JAMES PINE. [SEAL.]

Signed, sealed and delivered in the presence of— 589

J. HENRY GILBERT.
JOSEPH IRELAND.

STATE OF NEW YORK, Westchester County.

TOWN OF RYE, August 11, 1888.

Personally appeared before James Pine, signer and sealer of the foregoing instrument, and acknowledged the same to be his free act and deed before me.

J. HENRY GILBERT,
Commissioner for Connecticut,
Resident at Portchester,
N. Y. 570

J. Henry Gilbert, Commissioner for Connecticut.

Indorsed:

Quit Claim Deed, Samuel Pine from James Pine. Received for Record Sept. 23d, 1890, at 2.45 o'clock afternoon, and recorded in Greenwich Land Records, in Book No. 60 at page 352 by James R. Mead, Town Clerk. Plff.'s Exhibit Pine deed, Oct. 4", 1897. J. A. R. Examiner. (Town of Greenwich, Conn., Seal.)

WARRANTY DEED. GILLESPIE BROS., Printers and Stationers, Stamford, Conn. 571

TO ALL PEOPLE TO WHOM THESE PRESENTS SHALL COME—GREETING:

Know ye that We, Andrew Burns and Eloise Burns, husband and wife, of the Town of Greenwich, County of Fairfield and State of Connecticut, for and in consideration of Forty-eight Hundred Dollars received to our full satisfaction of Frederick Muller of the City, County and State of New York, do give, grant, bargain, sell, and confirm unto the said Frederick Muller, all that certain tract of land, with buildings thereon located at Riversville in said Town of Greenwich in quantity Forty acres, more or less, Bounded Northerly by land of Samuel K. Wilcox and land of Warren and 572
Jotham Sherwood, Easterly by the Highway leading from Glenville to North Greenwich, Southerly by land of W. H. H. Knapp, land of J. Wesley Sherwood and land of Mark Mead, and Westerly by land of Mark Mead.

Being the same premises conveyed to the Grantor Eloise Burns by her Father, Samuel Peck by Warrantee Deed, dated August 21, 1886, and Recorded in the Land Records of said Greenwich in Vol 54 at page 173.

The premises hereby conveyed are subject to a certain $2000 Mortgage in favor of Lizzie A Pardee, Dated March 8, 1890, and Recorded in said Records in Vol 63 at page 15 which mortgage the Grantee herein 573
assumes and agrees to pay as a portion of the above named consideration.

To have and to hold the above granted and bargained premises, with the privileges and appurtenances thereof, unto Him, the said grantee, His heirs and assigns forever, to His and their own proper use and behoof. And also, We the said grantors do for ourselves our heirs, executors and administrators, covenant with the said grantee His heirs and assigns that at and until the ensealing of these presents, we are well seized of the premises, as a good indefeasible estate in fee simple; and have good right to bargain and sell

574 the same in manner and form as is above written; and that the same is free from all incumbrances whatsoever, except as above mentioned.

And furthermore We the said grantors do by these presents bind ourselves and our heirs forever to warrant and defend the above granted and bargained premises to Him, the said grantee and His heirs and assigns, against all claims and demands whatsoever, except as aforesaid.

In Witness Whereof We have hereunto set our hands and seals this 2nd day of February, A. D. 1891.

ANDREW BURNS. [SEAL.]
ELOISE BURNS. [SEAL.]

575 Signed, sealed and delivered in presence of }

MATHIAS PFEIFFER,
FRED A. HUBBARD.

FREDERICK A. HUBBARD,
Notary Public,
Greenwich,
Fairfield Co.,
Conn.

GREENWICH, February 2, 1891.

STATE OF CONNECTICUT, Fairfield County, } ss.:

Personally appeared Andrew Burns and Eloise Burns, husband and wife, the above named Grantors,
576 signers and sealers of the foregoing instrument, and acknowledged the same to be Their free act and deed before me.

FRED A. HUBBARD,
Notary Public.

Indorsed:

Warranty Deed. Frederick Muller from Andrew Burns & wife. Received for Record February 2nd, 1891, at 2.30 o'clock afternoon, and recorded in Greenwich Land Records, in Book No. 61, at page 321, by James R. Mead, Town Clerk. Plff. Exhibit Muller deed, Oct. 4th, 1897. J. A. R., Examiner, (Town of Greenwich, Conn., Seal). Frederick A. Hubbard, Attorney at Law, Greenwich, Conn.

Complainant's Exhibit, November 16, 1897. 1b —Byram River weir overflow.

J. A. R., Examiner.

Statement showing flow of water over weir on Byram River at Tunnel Reservoir.

Date 1895.	Rainfall.	Gallons.	
July 1st	.17 inches	3,089,180	
2nd		2,564,407	
3rd		1,722,961	
4th	.69	4,058,588	
5th	.61	8,013,773	
6th	.46	7,018,513	
7 & 8th		6,581,634	2b
9th		1,835,412	
10th		2,068,070	
11th		1,951,741	
12th		1,835,412	
13th	.32	1,722,961	
14th		1,293,836	
15th		1,191,625	
16th	.21	1,395,947	
17th		1,395,947	
18th		1,292,544	
19th		1,085,736	
20th	.77	2,361,477	
21st		4,239,544	
22nd	.92	3,657,899	3b
23rd		2,194,739	
24th		1,395,947	
25th	.30	1,189,140	
26th		1,189,140	
27th	1.23	2,344,684	
28th		2,704,002	
29th		1,503,228	
30th	.61	1,845,752	
31st		1,956,911	

	Date 1895.	Rainfall.		Gallons.
4b	Aug. 1st			1,292,544
	2nd			997,843
	3rd			648,857
	4th	.35		917,706
	5th			1,292,544
	6th			666,952
	7th	.63		1,256,352
	8th			1,845,752
	9th			1,085,736
	10th	.15		995,258
	11th			2,230,940
	12th	1.14		3,942,259
	13th			2,621,279
5b	14th			1,499,351
	15th			1,096,077
	16th			723,824
	17th			723,824
	18th	.43		814,302
	19th			814,302
	20th			997,843
	21st			824,643
	22nd			491,166
	23rd			413,614
	24th			745,797
	25th			824,643
	26th			491,166
	27th			491,166
6b	28th			491,166
	29th			491,166
	30th	.02		491,166
	31st	.19		568,719
	Sept. 1st			493,751
	2nd			413,614
	3rd			413,614
	4th			284,359
	5th			351,571
	6th			491,166
	7th	.09		491,166
	8th			491,166
	9th			568,719

Date 1895.	Rainfall.	Gallons.	
Sept. 10th		642,272	
11th		568,719	
12th	.48	351,571	
13th		219,732	
14th		219,732	
15th		219,732	
16th	.10	284,359	
17th		413,614	
18th	.19	568,719	
19th		1,649,286	
20th		3,089,180	
21st		3,360,614	
22nd		3,360,614	
23rd		3,218,434	8b
24th		2,820,331	
25th		2,559,237	
26th	.58	2,559,237	
27th		2,307,191	
28th		1,951,741	
29th	.21	1,719,083	
30th	.65	1,602,754	
Oct. 1st		1,602,754	
2nd		1,602,754	
3rd		1,602,754	
4th		1,395,947	
5th		1,395,947	
6th		1,951,741	
7th		2,559,237	9b
8th	.27	2,817,745	
9th		2,688,491	
10th		1,845,752	
11th		997,843	
12th	.96	2,249,026	
13th	1.23	5,364,057	
14th	.20	6,010,329	
15th	.14	4,398,527	
16th		3,502,794	
17th		2,824,208	
18th		2,300,728	
19th		1,951,741	

	Date 1895.	Rainfall.	Gallons.
10h	Oct. 20th		1,602,754
	21st		1,602,754
	22nd		1,602,754
	23rd		1,602,754
	24th		1,602,754
	25th		1,602,754
	26th		1,602,754
	27th		1,499,351
	28th	.06	1,395,947
	29th		1,395,947
	30th		1,395,947
	31st	.33	3,298,572
	Nov. 1st	1.32	5,506,237
11h	2nd	.17	5,347,254
	3rd	.11	3,950,014
	4th		2,564,407
	5th		1,951,741
	6th		1,719,083
	7th		1,499,351
	8th		1,609,217
	9th		1,835,412
	10th	.07	1,503,228
	11th		1,085,736
	12th		995,258
	13th		1,293,836
	14th		5,493,312
	15th	2.41	13,869,997
12h	16th		12,990,067
	17th	.08	6,514,421
	18th		3,942,259
	19th		3,089,180
	20th	.12	3,368,369
	21st		3,232,652
	22nd		2,559,237
	23rd		3,376,124
	24th	.18	3,652,729
	25th	.04	4,102,534
	26th	.68	9,875,036
	27th	.76	12,382,571
	28th		7,871,592

Date 1895.	Rainfall.		Gallons.	
Nov. 29th			5,189,564	
30th			4,381,724	
Dec. 1st			4,381,724	
2nd	.62		7,393,351	
3rd			8,776,373	
4th			6,178,360	
5th			4,704,860	
6th			3,942,259	
7th			3,647,559	
8th			3,218,434	
9th			3,089,180	
10th			2,947,000	
11th			3,513,134	
12th			5,351,132	14b
13th				
14th				
15th				
16th				
17th				
18th				
19th				
20th				
21st				

13b

15b

Defendant's Exhibits Betts Memo., Dec. 21, 1899.

Gaugings run from July 1st, 1895, to Dec. 12th, 1895, when gauge was washed out.

Rainfall 2.91 for month.

Aug. 1895	Amount Measured	from 8.66 sq. miles.
1st	1292544	
2d	997843	
3d	648857	
4th	917706	
5th	1292544	
6th	666952	
7th	1256352	
8th	1845752	
9th	1085736	
10th	995258	
11th	2230940	
12th	3942259	
13th	2621279	
14th	1499351	
15th	1096077	
16th	723824	
17th	723824	
18th	814302	
19th	814302	
20th	997843	
21st	824643	
22d	491166	
23d	413614	
24th	475597	
25th	824643	
26th	491166	
27th	491166	
	30475540	

16 15 12 14 12 12
30475540

28th	491166	Minimum daily flow per Sq. mile 47709 Galls.
29th	491166	Minimum daily flow for 18.22 Sq. miles 869258 Galls.
30th	491166	
31st	568719	
	32517757	Mean daily flow per Sq. mile 121127 Galls.
		Mean daily flow for 18.22 Sq. miles 2206934 Galls.

Rainfall 1.65 inches.

Sept. 1895

1st	493751	Galls.
2d	413614	
3d	413614	
4th	284359	
5th	351571	
6th	491166	
7th	491166	
8th	491166	
9th	568719	
10th	642272	
11th	568719	
12th	351571	
13th	219732	
14th	219732	
15th	219732	
16th	284359	
17th	413614	
18th	568719	
19th	1649286	
20th	3089180	
21st	3360614	
22nd	3360614	
23rd	3218434	
24th	2820331	
25th	2559237	Minimum daily flow per Sq. mile 25373 Galls.
26th	2559237	Minimum daily flow per Sq. mile 462296 Galls.

27th	2307191
28th	1951741
29th	1719083
30th	1602754
	37685278

Mean daily flow per Sq. mile 145055 Galls.

13 14 15 14 13 12

Mean daily flow for 1822 Sq. miles 2642900 Galls.

Rainfall 3.09

Oct 1895

1st	1602754
2nd	1602754
3rd	1602754
4th	1395947
5th	1395947
6th	1951741
7th	2559237
8th	2817745
9th	2688491
10th	1845752
11th	997843
12th	2249026
13th	5364057
	28074048
	862865
	28074048
14th	6010329
15th	4398527
16th	3502794
17th	2824208
18th	2300728
19th	1951741
20th	1602754
21st	1602754
22nd	1602754
23rd	1602754
24th	1602754
25th	1602754
26th	1602754
27th	1602754

28th	1395947	Minimum daily flow per Sq. mile 115224 Galls.
29th	1395937	Minimum daily flow for 18.22 Sq. miles 2099381.
30th	1951741	
31st	2559237	
	69187279	Mean daily flow per Sq. mile 257719 Galls.
		Mean daily for 1822 Sq. miles 4695640 Galls.

During the entire summer of 1895 there were but 11 days when the flow for 18.22 Sq. miles was less than 1,000,000 galls. per day.

Total drainage Area of Byram River above Samuel Pines, exclusive of Area diverted by New York City= 18.22 Sq. miles.

Area diverted 8.66 Sq. miles.

Total Rainfall for the Year 1895=40.07 inches.

Average Yearly rainfall at Kensico=47.93 inches.

Fred. K. Betts, Asst. Eng.

577 CIRCUIT COURT OF THE UNITED STATES

IN AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendant.

} In Equity.

578

It is hereby consented that complainants' exhibits, both of October 4, 1897, one being deed from James Pine to Samuel Pine, dated 31st of May, 1888, and acknowledged August 11, 1888. and recorded September 23, 1890, in Greenwich Land Records in Book Number 60, page 352, and the other being deed from Andrew Burns and Eloise Burns his wife, to Frederick Muller, dated and acknowledged 2d day of February, 1891, and recorded 2d day of February, 1891, in Greenwich Land Records, in Book Number 61, page 321, be not filed, but that copies thereof may be filed in this court in lieu of the originals.

Dated New York, April 23, 1900.

579

MORAN & WILLIAMS,
Solicitors for Complainants.
JOHN WHALEN,
Solicitor for Defendant.

Indorsed:

Circuit Court of the United States for the Southern District of New York (In Equity). Samuel Pine and Frederick Muller, complainants, against The Mayor, Aldermen and Commonalty of the City of New York, defendant. Consent to file copies of deeds in lieu of originals. Moran & Williams, Solicitors for Complainants, 30 Broad street, New York, Manhattan.

CIRCUIT COURT OF THE UNITED STATES 580

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendant.

} In Equity.

581

It is stipulated that folios 1A to 17A, comprising pages 7 to 13 of the original depositions in this case, be inserted immediately after page 13 of the printed pleadings and proofs for final hearing, said folios 1A to 17A having been inadvertently omitted from the original printing of proofs for final hearing, and that Complainants' Exhibit November 16, 1897, Byram River Weir Overflow and Defendant's Exhibit "Betts Memorandum" (December 21, 1899, see fol. 407), being two statements of rainfall and water flow be inserted at the end of the proofs for final hearing.

Dated May 28, 1900.

MORAN & WILLIAMS,
Solicitors for Complainants. 582

JOHN WHALEN,
Solicitor for Defendant.

Indorsed:

Circuit Court of the United States for the Southern District of New York. In Equity. Samuel Pine and Frederick Muller, Complainants, against The Mayor, Aldermen and Commonalty of the City of New York, Defendant. Consent and Rule. Moran & Williams, Solicitors for Complainants, 30 Broad street, New York City, Manhattan. U. S. Circuit Court. Filed May 28, 1900. John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.

SHIPMAN, *C. J.*—The main facts of this case, as presented in the bill in equity, are not controverted in the answer. The complainants, Pine and Muller, are citizens and residents of the State of Connecticut, and each of them owns in fee a separate tract of land in that State, through which or upon and along which, the Byram river flows. This river, which is at the lands of the complainants a non-navigable stream, is made up of two branches. The East Branch is wholly in the State of Connecticut. The West and by far the most important branch rises in Westchester County, New York, flows southeasterly for about five miles in that State into Connecticut and thereafter unites with the East Branch at the farm of Muller about four miles from the New York boundary line. About a mile below his farm, the united stream forms the eastern boundary of Pine's farm for about 3,725 feet and thereafter empties into Long Island Sound. Upon his land there is a deposit of feldspar, which he manufactures, and he uses the water of the river for the needs of his farm-house and steam mill. Muller's farm has a frontage on

both sides of the river of 920 feet and extends on the west side of the river 450 additional feet, making an entire frontage of 2,290 feet. He uses the water of the river for general farm use. The bill in equity alleged that the damage to each complainant by the act of the defendant would be above $2,400.

Shortly before the bill was brought, the defendant began to build a dam across the West Branch of Byram river, at a point in the State of New York about 700 feet from the Connecticut State line, in order to divert the water of that branch into the Kensico Reservoir, which is part of the defendant's extensive system of water supply for the residents of the City of New York, and the dam has been completed at an expense, without any of its appurtenances, of about $45,000. By private arrangements, the defendant settled with the Connecticut mill proprietors on the stream for the injury caused by this dam to their flowage rights, but has never compensated the complainants or other riparian owners for the injury to their riparian rights. The answer admits that the defendant intends to divert some or all the water of the West Branch of the river from its natural channel, and avers that the diversion of the whole of it would be of little or no injury to the riparian owners. The diversion of water by the defendant is, as appears by the testimony of Mr. Birdsall, the Chief Engineer of the system for the water supply of New York, 7,600,000 gallons per day. The total average flow of the river at the junction of the two branches was 24,000,000 gallons per day. The decrease is, therefore, more than one-fourth. Testimony was offered by each party with respect to the value of the two properties and the amount of pecuniary damage in consequence of the diversion of the water. That there will be an actual continuing pecuniary damage more than nominal in amount is manifest, but whether more or less than $2,000, or what will be the exact amount I did not undertake to find because it was unnecessary. In the absence of a plea

to the jurisdiction, the allegation in the bills in equity that the amount of damage in each case exceeded $2,000, "though denied by the answer, even if not sustained by the proof, was sufficient to give the Circuit Court jurisdiction" (Butcher & Drover's Stock Yards Co. *vs.* Louisville & Nashville R. R. Co., 67 Fed. Rep., 35; De Sobry *vs.* Nicholson, 3 Wall., 420). A number of unknown factors enter into an estimate of damage from a diversion of water, such as the probabilities of future years of excessive drought, the prospective uses to which the properties may be applied and the prospective demands for other than agricultural uses, which cause the estimate of actual pecuniary damage to be one of inaccuracy.

The statutes of the State of New York do not undertake to give power to condemn land for public purposes which is situate in another State, and if they undertook to confer such power they would be ineffective (Holyoke Water Power Co. *vs.* Connecticut River Co., 52 Conn., 570; Farnham *vs.* Blackstone Canal, 1 Sumn., 46; U. S. *vs.* Ames, 1 Wood & Min., 76; Rutz *vs.* City of St. Louis, 7 Fed. Rep., 438). Neither is there a Connecticut statute which authorizes the City of New York to exercise any rights of eminent domain over land in Connecticut.

The conclusions which must result from the foregoing facts have been often clearly stated by various courts, and by none more clearly than by the courts of Connecticut and New York. The principles which underlie the case, or which are applicable, are as follows:

1. The right of a riparian proprietor upon a non-navigable stream to the use of the ordinary flow of the water of the stream, as it has been accustomed to flow and not diminished by an unreasonable use by a proprietor above him, "is not an easement or appurtenance, but is inseparably annexed to the soil and is parcel of the land itself" (Wadsworth *vs.* Tillotson, 15 Conn., 366; Clinton *vs.* Meyers, 46 N. Y., 511; Smith *vs.* City of Rochester, 92 N. Y., 463).

2. The unauthorized and uncompensated permanent diversion by a municipal corporation of the water of a non-navigable stream from a riparian owner is not excused by the fact that it was deemed to have been taken for a public benefit. The seizure and permanent diversion is a continuing wrong, unless compensation has been made either by agreement or under process of law and by virtue of authority conferred by the constitution and the statutes of the State (Seifert *vs.* City of Brooklyn, 101 N. Y., 136; Nolan *vs.* New Britain, 69 Conn., 668; Harding *vs.* Stamford Water Co., 41 Conn., 87).

3. An injunction to prevent a permanent and unauthorized seizure and diversion of running water is a proper and is the effectual remedy, because the remedy by an action at law provides only for the damages which had occurred before suit and compels a multiplicity of suits. It is the only efficient remedy for complete relief (Uline *vs.* N. Y. Central R. R. Co., 101 N. Y., 98; Corning *vs.* Troy Iron Foundry, 40 N. Y., 204; Amsterdam Knitting Co. *vs.* Dean, 162 N. Y., 278).

4. The equitable remedy by injunction exists and is to be exercised in the absence of any legislative authority for the infliction of the permanent injury, although the pecuniary damage to the riparian proprietor is not of large amount. The fact of no serious pecuniary damage is not a hindrance to the right of the riparian proprietor to the restoration of the water to its natural course. This principle has been fully stated by the courts of the State of New York (Corning *vs.* Troy Iron Foundry, 40 N. Y., 191; Gilzinger *vs.* Saugertree Co., 66 Hun, 173; affirmed in 142 N. Y., 633; Amsterdam Knitting Co. *vs.* Dean, 162 N. Y., 278; Legg *vs.* Horn, 45 Conn., 409).

5. If a court of equity has power in any case by decree to ascertain and order the payment of dam-

ages by decree of injunction in the alternative, a court of equity will not exercise such power where the defendant has committed a permanent injury without authority of law and without pretense of right to take and retain the property (Pappenheim *vs.* Elevated Railroad, 128 N. Y., 436; Stowers *vs.* Gilbert, 156 N. Y., 600). But a court of equity can properly delay the issuance of an order of injunction to allow the defendants an opportunity to agree with the complainants in regard to adequacy of compensation (Harding *vs.* Stamford Water Co., *supra*).

Let there be a decree, with costs, that if on November 1, 1900, there shall have been no agreement between the parties as to the amount of compensation to the complainants for the injury they have separately sustained by this diversion of the water of Byram river and no payment of such agreed compensation, an order of injunction shall issue to restrain the defendant, its officers, agents and employees, from diverting the water of the West Branch of Byram river, or any part thereof, or from preventing in any way said water or any part thereof, at any time from flowing through its natural channel before, at and below the junction of the two branches of said river.

Indorsed:

United States Circuit Court for the Southern District of New York. Samuel Pine and Frederick Muller *v.* The Mayor, Aldermen and Commonalty of the City of New York. Opinion. Shipman, *C. J.* U. S. Circuit Court. Filed Jun. 27, 1900. John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendant.

} In Equity.

This cause came on to be heard at a Term of the United States Circuit Court for the Southern District of New York, and was argued by counsel and thereupon, upon consideration thereof, it is

Ordered, and adjudged and decreed as follows, to wit:

That the complainants in this suit and each of them are entitled to the injunction order of this Court restraining the defendant, its successors and assigns, their and its officers, agents and employees, each, all and any of them, from diverting the water or any part of the water of the West Branch of the Byram river or any part of the water of the Byram river, or in preventing in any way said water or any part thereof at any time from flowing through its natural channel, before, at and below the junction of the two branches of said river; and

It is further ordered, adjudged and decreed, that the defendant, its successors and assigns, their and its officers, agents and employees, each, any and all of them, be and they and each of them are hereby perpetually enjoined from diverting the water or any part

of the water of the West Branch of the Byram river, or any part of the water of the Byram river, or in preventing in any way said water or any part thereof at any time from flowing through its natural channel, before, at and below the junction of the two branches of said river; and

It is further ordered, adjudged and decreed, that a writ of injunction do issue on the first day of November, in the year nineteen hundred, against the defendant, its successors and assigns, their and its officers, agents and employees and each, any and all of them, commanding them to comply with all and singular the premises, matters and things so enjoined upon them; and

It is further ordered, adjudged and decreed, that the complainants and each of them recover their costs in the premises to be taxed by the Clerk of this Court.

Dated July 24, 1900.

N. SHIPMAN,
Circuit Judge.

We hereby agree to the form of the above proposed judgment.

Dated July 13, 1900.

MORAN & WILLIAMS,
Solicitors for Complainants.
JOHN WHALEN,
Solicitor for Defendant.

Indorsed:

U. S. Circuit Court for the Southern District of New York. In Equity. Samuel Pine & Frederick Muller, Complts. agst. the Mayor, Aldermen & Commonalty of The City of New York, Deft. Judgment. Marshall, Moran, Williams & McVickar, Solicitors for Complts., 30 Broad Street (Manhattan), New York City. U. S. Circuit Court. Filed Jul. 28, 1900. John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendants.

In Equity.

Assignment of Errors.

And now comes the above-named defendant by its solicitor, and presents with its accompanying petition of appeal from the judgment rendered in this cause the following assignment of errors:

I.—The Court erred in not deciding that there was sufficient water left the complainants for all their respective uses as ordinary riparian proprietors, and that an injunction should be denied.

II.—The Court erred in not deciding that no substantial injury had accrued or would accrue to complainants, and that an injunction should be denied.

III.—The Court erred in not deciding that no substantial injury had accrued or would accrue to complainants that could not be well compensated for in an action at law, and that an injunction should be denied.

IV.—The Court erred in not deciding the amount of damages, if any (not to exceed $2,400 each, as prayed for in the bill of complaint), the complainants had suffered, or will suffer, in consequence of the acts of defendant, and that defendant be permitted to pay such damages at their option, and on payment of same the complainants deliver to defendant conveyances of the right to divert the stream at the dam near the State line in perpetuity.

V.—The Court erred in not deciding that the public necessities of a great municipality requires the diversion of water complained of, and that an injunction should not issue until such reasonable time as proper remedial legislation is obtained to enable defendant to acquire in condemnation proceedings the right to divert this stream from complainants' lands.

VI.—The Court erred in not deciding that the public necessities of a great municipality require the diversion of water complained of, and an injunction should not issue, but that the complainants should be left to their actions at law for damages.

VII.—The Court erred in not deciding that there has been or will be no damage suffered by complainants which cannot be compensated in money, and no injunction should issue.

VIII.—The Court erred in not deciding that there was no irreparable and irremedial damage, and that therefore an injunction would not lie.

IX.—The Court erred in not deciding that the diversion complained of being done in New York State by a municipal corporation, to whom was delegated by the Legislature of the State the authority to provide for the public necessities of a water supply for a large number of inhabitants of said State, this Court has no power to enjoin their acts in so doing.

X.—The Court erred in deciding that an injunction should issue.

XI.—The Court erred in not dismissing the bill of complainants for improper joinder of parties complainants.

XII.—The Court erred in not deciding that the diversion complained of being done under legislative authority by a municipal corporation in New York this Court has no authority to restrain such acts.

XIII.—The Court erred in granting the injunction since it appeared from the record that the complainants had always had sufficient water for their uses as ordinary riparian proprietors, and since it appeared that no substantial injury had accrued or could accrue that could not be well compensated for in law.

XIV.—The Court erred in admitting improper testimony on behalf of the appellee against the objection and exception of this appellant, and erroneously excluded proper testimony offered by this appellant upon the objection of the appellee and against the exception of this appellant.

Wherefore and for other reasons the defendant prays that the said judgment be reversed with costs.

JOHN WHALEN,
Defendant's Solicitor.

Indorsed:

United States Circuit Court For the Southern District of New York, In Equity. Samuel Pine and Frederick Muller, Complainants, against The Mayor, Aldermen and Commonalty of the City of New York, Defendants. Assignment of Errors. John Whalen, Defendant's Solicitor, No. 2 Tryon Row, New York. U. S. Circuit Court. Filed Oct. 31, 1900. John A. Shields, Clerk.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA

FOR THE SOUTHERN DISTRICT OF NEW YORK,

In the Second Circuit.

SAMUEL PINE and FREDERICK MULLER,
Complainants,

against

THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK,
Defendants.

Bond for damages and costs.

Know all men by these presents, That we, The United States Fidelity and Guaranty Company of Baltimore, Maryland, are held and firmly bound unto the above-named Samuel Pine and Frederick Muller, in the sum of one thousand dollars to be paid to the said Samuel Pine and Frederick Muller for the payment of which well and truly to be made, we bind ourselves, our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 30th day of October, in the year of our Lord one thousand nine hundred.

Whereas, The above-named The Mayor, Aldermen and Commonalty of the City of New York, defendants, have prosecuted an appeal to the United States Circuit Court of Appeals for the Second Circuit, to reverse the judgment rendered in the above entitled suit, by the Judge of the Circuit Court of the United States, for the Southern District of New York, made and entered July 30, 1900.

Now, therefore, the condition of this obligation is such that if the above-named defendants shall prosecute said appeal to effect and answer all damages and costs, if said defendants fail to make the said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]
By SYLVESTER J. O'SULLIVAN,
Manager.

Attest:

WYLLYS BENEDICT,
Attorney in fact.

Sealed and delivered and taken and acknowledged this 30th day of October, 1900, before me.

HARRY C. HARDEN,
[SEAL.] Notary Public,
New York County.

Affidavit, acknowledgment and justification by the United States Fidelity and Guaranty Company.

WE WILL BOND YOU.

SOUTHERN DISTRICT OF NEW YORK,
State of New York,
County of New York, } ss.:

On this 30th day of October, one thousand nine hundred, before me personally came Sylvester J. O'Sullivan, known to me to be the manager of The United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of the Mayor, Aldermen, etc., as surety thereon, and who being by me duly sworn, deposes and says: That he resides in the City of New York, State of New York; and that he

is the manager of said The United Fidelity and Guaranty Company, and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of the Mayor, Aldermen, etc., is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said company; and that he signed his name thereto by like order and authority as manager of said company; and that he is acquainted with Wyllys Benedict and knows him to be the attorney in fact of said company; and that the signature of said Wyllys Benedict subscribed to said bond is in the genuine handwriting of said Wyllys Benedict and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said company, unincumbered and liable to execution, exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million dollars ($1,000,000).

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence, this 30th day of October, 1900.

HARRY C. HARDEN,
[SEAL.] Notary Public (24),
New York County.

Indorsed:

U. S. Circuit Court, S. D. N. Y. Samuel Pine *et al vs.* The Mayor, etc. Bond. Approved as to form and also as to sufficiency of sureties, with reservation, however, to the complainants of the right at any time to examine the proper officers of the surety company, under oath, touching its liabilities, assets, and financial

condition generally. E. Henry Lacombe, U. S. Circuit Judge. U. S. Circuit Court. Filed October 31, 1900. John A. Shields, Clerk.

UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

SAMUEL PINE and FREDERICK MULLER, Complainants, *against* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, Defendants.	In Equity.

The above-named defendant The Mayor, Aldermen and Commonalty of the City of New York, conceiving itself aggrieved by the decree made and entered July 30, 1900, in the above entitled cause, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed and a citation granted, directed to the above-named complainants commanding them and each of them to appear before the United States Circuit Court of Appeals for the Second Circuit to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers upon which said decree was made may be duly

authenticated and sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated October 31, 1900.

JOHN WHALEN,
Solicitor and of Counsel for Defendant.

The above appeal is hereby allowed.

Dated October 31, 1900.

E. H. LACOMBE,
U. S. Circuit Judge.

Indorsed:

United States Circuit Court for the Southern District of New York, in Equity. Samuel Pine and Frederick Muller, Complainants, against the Mayor, Aldermen and Commonalty of the City of New York, Defendants. Petition on Appeal. John Whalen, Solicitor for Defendant, No. 2 Tryon Row, New York. Due and personal service of a copy of within petition and allowance of appeal is hereby admitted. Dated Nov. 1, 1900. Marshall, Moran, Williams & McVickar, Attys. for Complainants. U. S. Circuit Court. Filed Nov. 1, 1900. John A. Shields, Clerk.

By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States, for the Southern District of New York, in the Second Circuit, to Samuel Pine and Frederick Muller, GREETING:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan, in the City of New York, in the district and circuit above named, on the 28th day of November, 1900, pursuant to a petition and assignment of errors filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York,

wherein the Mayor, Aldermen and Commonalty of the City of New York are defendants and appellants, and you are complainants and respondents to show cause, if any there be, why the judgment in said suit in equity mentioned should not be corrected and reversed, and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the district and circuit above named, this 31st day of October, in the year of our Lord one thousand nine hundred, and of the Independence of these United States the one hundred and twenty-fifth.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

Indorsed:

United States Circuit Court of Appeals for the Second Circuit. Samuel Pine and Frederick Muller, Complainants *vs.* The Mayor, Aldermen and Commonalty of the City of New York, Defendants. Citation. Due and personal service of a copy of within citation is hereby admitted. Dated Nov. 1, 1900. Marshall, Moran, Williams & McVickar, Attys. for Complainants. United States Circuit Court. Nov. 1, 1900. John A. Shields, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } *ss.:*

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing papers numbered from one to 224, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Samuel Pine and Frederick Muller, complainants-appellees, against the Mayor, Aldermen and Commonalty of the City of New York, Defendants-

Appellants, as the same remain of record and on file in my office.

In Testimony Whereof I have caused the seal of the said Court to be hereunto affixed at the City of New York, in the Southern District of New York, in the Second Circuit, this 30th day of November, in the year of our Lord one thousand nine hundred, and of the Independence of the said United States the one hundred and twenty-fifth.

[SEAL.]
(STAMP)

JOHN A. SHIELDS,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 138.—October Term, 1900.

Before Judges Wallace, Wheeler and Thomas.

Samuel Pine and Frederick Muller, Complainants—Appellees, *against* The Mayor, etc., of the City of New York, Defendants—Appellants.	Submitted March 14, 1901. Decided October 30, 1901.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Thomas, *J.*—The first question is, whether the State of New York, in the exercise of its power of eminent domain, can enable the defendant the City of New York to erect within the limits of that State a dam across an unnavigable river, having its source in ponds in the State of New York, and divert the water thereby accumulated to a great distance for general distribution and use in the City of New York, and, by thus materially diminishing the flowage, substantially injure riparian rights in the State of Connecticut pertaining to a stream to which the river in New York is the principal tributary.

The second question is, whether a statute of New York purporting to enable the City of New York to do the act above stated, and providing a remedy whereby the riparian owner in Connecticut may obtain compensation for the injury, furnishes a proper remedy, or should the present suit to enjoin the defendant as a wrongdoer be sustained.

Without reference to authorities, certain applicable legal rules may be accepted, viz.: (1) The defendant is not a riparian owner and is not exercising the usual rights of riparian owners; (2) even if the defendant had acquired all the riparian rights save those of the complainants the diversion is not thereby justified; (3) the State of New York cannot authorize the taking of property in Connecticut; (4) the diversion of the water is not an act which a court of equity could approve or regulate under a power to apportion or adjust the use of the water among riparian owners; (5) the usual powers of the State of New York respecting navigable rivers within its borders does not extend to unnavigable interstate streams; (6) the diversion is a tortious act initiated in New York and, as to the complainants, taking effect in Connecticut, for which the present suit should lie; (7) the diversion of water at one point is a taking of the property of riparian owners below the point of diversion and falls within the constitutional protection; (8) the right of the complainants to use the water as it is wont to flow is not an easement, but an incident to and inseparably connected with their land; (9) a court of equity, asked to enjoin the taking the property, where such taking is not authorized and is therefore tortious, will not make its decree for an injunction conditional upon the ascertainment of the value of the property taken and payment to the complainants, unless there be present facts which should equitably estop the complainants and limit them to such relief.

The foregoing propositions are based largely upon principles of the common law and supported uniformly in all jurisdictions where, as to this subject, the common law prevails, as it does in the States of New York and Connecticut, unless certain decisions in Massachusetts be exceptions. The contention is understood to be that the latter decisions are authority for two propositions: (1) That the complainants' property rights taken by defendant are easements dependent upon servitudes upon land in the State of New York,

which servitudes the State of New York may, under its own law, extinguish upon making constitutional compensation, and thereby enable the defendant to continue the diversion; (2) That the statutory provision for compensation is the only remedy to which the complainants may resort in the State of New York.

The affirmance of the second proposition depends upon the establishment of the first. If the State of New York may extinguish the so-called servitudes in that State, in the exercise of its power of eminent domain, and thereby separate the same from complainants' property in Connecticut, so as to satisfy the complainants' whole claim for compensation, it may, of course, limit those injured to any method otherwise constitutional for making compensation. But if the act of diversion is tortious, and is not relieved of such character by some power of the State to extinguish the alleged servitudes, and thereby satisfy the complainants' whole demand for compensation, then the statute of New York, as a compulsory statute, is not binding upon the owners of riparian rights in Connecticut, and this Court will not compel such owners to employ the statute for the purposes of redress. A State cannot enact a statute purporting to authorize property to be taken beyond its boundaries, and deny a remedy to a person wronged unless he resort to and thereby ratify the statute by securing his compensation pursuant to it. In such case the State seizes by wrong and without constitutional right under the color of statute, and insists that the offended person shall waive the tort, declare the tortious act a valid act by seeking his remedy under the very statute which as to him is void and ineffective. The wrongdoer thus by sheer might commits an actionable wrong, and shields itself from answering therefor unless pursuant to the statutory command by which the wrong was ordered done.

What are the decisions in Massachusetts? The Court is referred to Brickett *vs.* Haverhill Aqueduct Co., 142 Mass., 394; Banigan *vs.* City of Worcester, 30

F. R., 392; Manville Co. *vs.* City of Worcester, 138 Mass., 89. In the Brickett case the plaintiff, whose citizenship is not stated, owned land situated partly in Massachusetts and partly in New Hampshire. He brought an action for tort based upon the claim that the defendant, acting under an enabling statute of Massachusetts, had diminished the flow of water through this land, and asked to recover his damages in such action. In other words, he sought to recover the value of the property taken in a court of the jurisdiction where the tortious act was initiated. The Legislature had provided a particular statutory remedy for ascertaining such injury and consequent damages, and relegated the plaintiff to procedure under such statute, and, in effect, held that, when the proprietor of property outside of the State sought pecuniary redress in the State, he must pursue the new remedy that the State had provided for the particular class of injuries within which his own injury fell. The plaintiff objected that this statute was unconstitutional, not because it could have no extra-territorial operation, but "because it does not make adequate provision for the recovery of damages caused by the defendant's acts under it." The Court held that the statute was not open to such objection. That was the sole question in issue, and in determining such issue it was stated that it was not important that the land of the plaintiff which was injured was without the limits of the State. The plaintiff sought damages for a tort in the jurisdiction of the tort feasor. He did not ask for relief against the continuance of the tortious act. His action for damages was an affirmation of the taking, and he was constrained to resort to the same remedy that was obligatory upon those who sought similar relief. There is no occasion for criticising this holding. It was a mere application of a familiar rule that a new remedy for ascertaining damages, found ample to meet the constitutional requirement, supersedes the usual common law action. In Banigan *vs.* City of Worcester,

supra, it appears that, pursuant to an enabling act of Massachusetts, the defendant had diverted from a stream in that State water which would have flowed in its natural course through plaintiff's land in Rhode Island. The injured owner came into the Supreme Court of Massachusetts and petitioned that his damages might be assessed under the statute from which the defendant derived such authority as he had to make the diversion, and thereafter removed the case to the United States Circuit Court for the District of Massachusetts. The defendant moved to remand the case to the court of the State, and also filed a demurrer to the petition. It was considered that the right of removal existed, and that the petitioner might avail himself of the statute. It is difficult to conceive of other suitable holding. But in his opinion Judge Carpenter says:

> "On the demurrer the defendant alleges that the "petitions show no cause for relief under the stat- "ute. The argument is, that since the lands of the "petitioners are in Rhode Island and their rights "in the water of Tatnuck brook are appurtenant "to those lands, the petitioners cannot claim a "remedy under this statute unless it be held to "have extra-territorial effect, which, of course "is inadmissible. I cannot agree with this "argument. It has been held by the Su- "preme Court of Massachusetts that the "owner of land in an adjoining State may have, "as appurtenant to such land, an interest in land "or water in Massachusetts, which may be pro- "tected by suit in the courts of that State. Man- "ville Co. *vs.* City of Worcester, 138 Mass., 89. I "am strongly inclined to the opinion that the "decision in that case is of binding force on this "Court in the case at bar; and, even if it not be "so, I am inclined to follow that case as being of "high authority, and well supported by the reason "ing of the opinion."

It will be observed that the learned Judge does not state that all of the plaintiff's property rights taken are in the State of Massachusetts, so that they may be taken *uninvitum* under the power of eminent domain possessed by that State, but that they have an interest in land or water in Massachusetts, which may be protected by suit in courts of that State. The particular redress sought in the Banigan case was full compensation, and the property owner elected to obtain such redress in a statutory proceeding which had been provided by the State. This is far from holding that such statute was compulsory, and that if the foreign owner chose to assert that his property in Rhode Island could not be taken under the statute, relief enjoining the continuance of the diversion would be denied.

This brings the inquiry to the facts and holding in Manville *vs.* City of Worcester, to which Judge Carpenter referred in the language quoted, quite unnecessarily, as it seems, for the purposes of his decision. The action was for tort in diverting the waters of a natural stream in Massachusetts, and preventing the same from coming to the plaintiff's mill in the State of Rhode Island. The plaintiff was the owner of a mill in Rhode Island upon the Blackstone river; the defendant had withdrawn, in Massachusetts, enough of the waters of Tatnuck brook, a tributary of that river, materially to affect the operation of the mill. In the opinion it is stated:

> "The main question argued before us is raised by "the refusal of a ruling requested by the defend- "ant that 'the diversion of the waters of a natural "stream in this State and preventing the same "from coming to the plaintiff's mill, situated in "Rhode Island, is not a tort for which the plain- "tiff can recover in the courts of this Com- "monwealth.' The defendant's counsel con- "tended, in the first place, that such rights as the "plaintiff claims cannot extend beyond the Rhode

"Island line, and went the length of maintain-
"ing that a servitude cannot be created in one State
"in favor of lands in another. We are unable to
"agree to this proposition upon either principle
"or authority. Every decision and dictum that
"we have found, bearing on the precise point, is
"the other way (citing cases). We think that the
"cases which recognize civil, and even criminal,
"liability for flowing land, in one State by means of
"a dam in another, are hardly less pertinent
"(citing cases). The defendant admits these cases
"to be law, and tries to distinguish them. But we
"cannot assent to the distinction between dis-
"charging and withdrawing water. The conse-
"quence in one case is positive, in the other nega-
"tive; but in each it is the consequence of an act
"done outside the jurisdiction where the harm
"occurs, and the consequence is as direct in the
"latter case as in the former. The right infringed
"in the former case is called absolute ownership,
"in the latter easement; but the laws of Rhode
"Island, which make a man owner of a tract of
"land there, have no more power to diminish free-
"dom of action in Massachusetts than any other
"of its laws. A concurrence of the laws of both
"States is as necessary in that case as in the one
"at bar, to create a liability which can be
"enforced in either State consistently with
"principle. Such a concurrence presents no
"technical difficulties, and, if the substantive
"end to be attained is a proper one, it will
"be recognized and acted on here, and we have
"no doubt that it would be in Rhode Island if the
"position of the parties were reversed."

Thus far it appears that the action was for tort; that the Court held that there was a cause of action for tort; that the tortious act was done in the State of Massachusetts; that the injury was done in Rhode Island, and that a concurrence of the laws of both States

was necessary to create a liability which could be enforced in either State, consistently with principle. This last statement accords with the usual holding, that a tortious act, doing injury in one jurisdiction, will not be enforced in another, unless there is a cause of action in both jurisdictions. To this point there is no statement that is not in harmony with general law. But the opinion continues:

> "Of course, the laws of Rhode Island cannot subject Massachusetts land to a servitude, and apart from any constitutional considerations, if there are any, which we do not mean to intimate, Massachusetts might prohibit the creation of such servitudes. So it might authorize any acts to be done within its limits, however injurious to lands or persons outside them. But it does not do either. It has no more objection to a citizen of Rhode Island owning an easement, as incident to his ownership of land in that State, than it has to his owning it in gross, or to his purchasing lands here in fee. Questions might be conceived as to the transfer of such easements, but they do not arise here (Slack *vs.* Walcott, *ubi supra*). So far as their creation is concerned the law of Massachusetts governs, whether the mode of creation be by deed or prescription, or whether the right be one which is regarded as naturally arising out of the relation between the two States; being created, the law of Rhode Island, by permission of that of Massachusetts, lays hold of them and attaches them in such way as it sees fit to land there, Massachusetts being secured against anything contrary to its views of policy by the common traditions of the two States and by the power over its own territory which it holds in reserve."

The portion of the opinion last quoted holds (1) that Rhode Island cannot subject to a servitude land in Massachusetts; (2) that Massachusetts might prohibit the

creation of such servitudes, and, so far as their creation is concerned, the law of Massachusetts governs; (3) that after their creation the law of Rhode Island, by the permission of that of Massachusetts, attaches easements as it sees fit to the land in Rhode Island; (4) that Massachusetts might authorize any acts to be done within its limits, however injurious to lands or persons outside of them.

Two of the holdings above enumerated may be considered: That the property right of the riparian owner involves an easement to which land in the State of Massachusetts is subject by way of servitude; that the State of Massachusetts might authorize any acts to be done within its limits, however injurious to lands or persons outside of them. Relating these holdings to the case at bar, it should be observed that the property right of the owners in Connecticut has not been regarded as involving an easement. It is true that rights respecting the use of a stream, whereby the land of other riparian owners is burdened, may be acquired by grant or prescription. Such is the right to diminish the flowage to lower proprietors from the quantity originally due them, the right to corrupt the quality of water, or to set it back upon the lands of other proprietors. The rights thus obtained are easements, but primarily riparian proprietors are entitled to the natural flow of water that they may use the same as incident to the land bordering on the stream and owned by them. The water-course begins *ex jure naturæ*, and having taken a course naturally, all riparian owners own a use thereof as it flows and should flow the land owned by them (Kent's Com., vol. 3, pp. 439, 442). "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*Currere solebat*), without diminution or alteration" (Kent's Com., vol. 9, p. 439). But easements are acquired by grant, express or implied, or prescription (Wolfe *vs.* Frost, 4 Sandf., chap. 72;

Washburn on Real Property, vol. 2, p. 315, [5th ed.]). The right of a riparian owner that a stream shall flow naturally in its channel is not acquired either by grant or prescription. Servitudes are artificial creations; nature imposed the servitudes upon the banks of a stream, that it should be subject to the flow of water. Mr. Washburn (vol. 2, p. 366 [5th ed.]) says:

> "Property in water, in connection with real es-
> "tate, can only be predicated of its use, which
> "serves by its enjoyment to give value to the cor-
> "poreal hereditament with which its use is applied.
> "Thus the riparian proprietor of land bordering
> "upon a running stream has a right to the benefit
> "to be derived from the flow of water thereof, as
> "a natural incident to his estate, and no one may
> "lawfully divert the same against his consent. Nor
> "can this right be considered as an easement, since
> "it belongs to the estate of the landowner through
> "which the water flows, as forming one of the ele-
> "ments of which this estate is composed."

A writer of recognized authority upon this subject states:

> "The right to the use of the water in its natural
> "flow is not a mere easement or appurtenance, but
> "is inseparably annexed to the soil itself. It does
> "not depend upon appropriation or presumed
> "grant from long acquiescence on the part of other
> "riparian proprietors above and below, but exists
> "*jure naturæ* as parcel of the land" (Gould on
> "Waters, p. 396).

Such is the general view of the nature of the rights of riparian owners (St. Louis Mining and Milling Co. *vs.* Montana Mining Co., 58 F. R., 129, 137; Schriver *vs.* Smith, 100 N. Y., 471). The case last cited amply discusses the subject and precludes the necessity of reference to similar holdings in numerous authorities. Therefore, without further examination, the conclusion may be stated that the complainants have

no easements related to property within the State of New York which that State may take in the exercise of its power of eminent domain. This leaves unconsidered the statement in Manville *vs.* City of Worcester, to the effect that the State of Massachusetts "might authorize any acts to be done within its limits, however injurious to lands or persons outside of them." Does this mean that the Legislature of the State of Massachusetts may authorize a tortious act to be done within the limits of that State, to take effect upon property without the State? The statement should not be isolated and given such construction. Rather it is to be inferred that it relates to and is based upon the view that the proprietor in Rhode Island owned an easement or privilege in land in Massachusetts, of which the latter State had jurisdiction. But it is considered that such estimate of the nature of the property rights of riparian owners is not that usually adopted. Whatever may have been said *arguendo* in the opinion in Manville Co. *vs.* City of Worcester, it is obvious that there is no holding in the courts of Massachusetts or other jurisdiction that the Legislature of one State may authorize one of its municipalities to take, in the exercise of its power of eminent domain, property situated without the State, be it property of a riparian owner in a foreign State, or otherwise. On the other hand, the decision of Judge Shipman in the case at bar follows his conclusion in Holyoke Water Power Co. *vs.* The Connecticut River Co., 52 Conn., 570; 22 Blatch., 131, which has not been modified by subsequent decisions, and finds direct support in Rutz *vs.* City of St. Louis, 7 F. R., 438; opinion of Attorney-General of Pennsylvania, 54 Am. Law Register, 385; the discussion of Judge Story, in Slack *vs.* Walcott, 3 Mason, 517; of Judge Woodruff, in The Matter of Townsend, 39 N. Y., 179, and the article upon "The Power of a State to Divert an Interstate River," 8 Harv. Law Review, 138. Judge Story succinctly states the nature and location of rights similar to those involved in the suit at bar in Slack *vs.* Walcott. The plain-

tiffs were citizens of and owners of a mill in the State of Massachusetts, on the east side of Pawtucket river, and the defendants were citizens of and owners of a mill in Rhode Island, on the west side of the same river, the river forming the boundary between the two States. The bill was brought in the Circuit Court of the United States for the District of Rhode Island, to establish the title of the plaintiffs to a prior use of the water for the purpose of supplying their mill, and alleged an obstruction of the accustomed course of the water through their mill by the defendants, by withdrawing it to the use of the defendants on the Rhode Island side of the river, and prayed for an injunction. One of the plaintiffs died, having devised his interest in the mill to one Walcott. Upon due probate of the will in the State of Massachusetts, the devisee and the other plaintiffs brought a bill to revive the suit without making the heirs-at-law of the testator parties, and in considering whether the devisee was entitled to revive the suit, Judge STORY stated as follows:

"I am not prepared, however, to accede to the "argument of the defendant's counsel, that the "will in this case is not admissible in evidence "until after probate in the State of Rhode Island. "It does not strike me that any such probate for "the purposes of this suit is necessary. The mill "in controversy is situated in Massachusetts; the "river, the use of whose waters is claimed as "appurtenant to the mill, is the boundary "of the two States, and the waters, therefore, "partly flow in each State. The right, however, "is not a distinct right to the water, as *terra aqua* "*co-operata*, or as a distinct corporeal hereditament, but as an incident to the mill, and attached "to the realty. It passes by grant of the mill and "has no independent existence. It is not real "estate situated in Rhode Island. It is an incorporeal hereditament annexed to a freehold in "Massachusetts. And a conveyance of the mill,

"good by the laws of the State where the mill is "situated, conveys all the appurtenances. The "wrong done by stopping the flow of the water by "any obstruction or drain in Rhode Island is an "injury done to the mill itself in Massachusetts. "In a just sense the wrong may be said to be done "in both States, like the analogous case of an "injury to land lying in one county by an act done "in another county."

The judgment should be affirmed with costs.

WALLACE, *J.*, concurred.

WHEELER, *J.* (dissenting)—The defendant has done nothing in question here outside of the State of New York; the deprivation of water complained was wholly within that State, and if the plaintiffs have any rights in the water taken they exist within that State and were subject to and taken under the eminent domain of that State. The plaintiffs have come into this court because they are citizens of another State and *not because their lands through which they derive their rights to the water taken is situated in another State.* Mr. Justice Gray, in Head *vs.* Amoskeag Co., 113 U. S., 9, said, at page 9: "The right to the use of running water is *publici juris* and common to all the proprietors of the bed and banks of the stream from its source to its outlet." Thus these parties have a common interest in the water in question which the defendant has taken under the law of the State and not as a trespasser. It seems to be familiar law that when an injunction is applied for to restrain such a taking the damages will be ascertained and the injunction withheld on making payment. In that case Mr. Justice Gray further said, at page 21: "When property in which several persons have a common interest cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures neces-

sary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified."

The plaintiffs' rights do not depend at all upon State lines, and are not any different from what they would be if their lands were within the State of New York, and the damages can as well be ascertained as if the jurisdiction of that State extended over them. In Brickett *vs.* Haverhill Aqueduct Co., 142 Mass., 394, Mr. Chief Justice Morton, in speaking of the eminent domain of Massachusetts over water flowing into New Hampshire, said: "We do not deem it important that the land of the plaintiff which was injured was outside of the limits of this State." As the plaintiffs have come into this court within the State where the taking complained of, which is not a trespass, was done for relief, they are entitled to and should have such relief as is usually afforded in such cases. I think the damages should be ascertained and the injunction withheld for an opportunity to pay them.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court-rooms in the Post Office Building, in the City of New York, on the 11th day of November, one thousand nine hundred and one.

Present—Hon. WILLIAM J. WALLACE, Circuit Judge, and Hon. HOYT H. WHEELER and Hon. EDWARD B. THOMAS, District Judges.

SAMUEL PINE *et al.*,
Complainants-Appellees,

against

THE MAYOR, *etc.*, OF THE CITY OF NEW YORK,
Defendants-Appellants.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration, wherefore, it is now hereby ordered, adjudged and decreed that the decree of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a mandate issue to the said Circuit Court in accordance with this decree.

UNITED STATES OF AMERICA, } ss.:
Southern District of New York, }

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 286, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Samuel Pine *et al.*, against the Mayor, etc., of the City of New York, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 3d day of December, in the year of our Lord one thousand nine hundred and one and of the Independence of the said United States the one hundred and twenty-sixth.

WILLIAM PARKIN,
Clerk.

238 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Being informed that there is now pending before you a suit in which The Mayor, Aldermen and Commonalty of the City of New York are appellants and Samuel Pine and Frederick Muller are appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States,

239 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of January, in the year of our Lord one thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

240 [Endorsed:] File No. 18,344. Supreme Court of the United States. No. 491, October term, 1901. The City of New York & Bird S. Coler, comptroller, *vs.* Samuel Pine and Frederick Muller. Writ of certiorari.

241 United States Circuit Court of Appeals, Second Circuit.

SAMUEL PINE ET AL., Complainants, Appellees,
vs.
THE MAYOR, ETC., OF THE CITY OF NEW YORK, Defendants, Appellants.

It is hereby stipulated that the record already certified and on file in the office of the clerk of the Supreme Court of the United States in the above-entitled case may be taken as the return to the writ of certiorari issued by said United States Supreme Court herein.

GEORGE L. STERLING,
Counsel for Appellants.
CHARLES C. MARSHALL,
STEPHEN E. WILLIAMS,
Counsel for Appellees.

Endorsed: United States circuit court of appeals, second circuit. Samuel Pine *vs.* The Mayor etc., of N. Y. Stipulation. United States circuit court of appeals, second circuit. Filed Jan. 10, 1902. William Parkin, clerk.

242 United States Circuit Court of Appeals, Second Circui

To the honorable the Supreme Court of the United States, Gr

The record and all proceedings whereof mention is withi having been lately certified and filed in the office of the clerk United States Supreme Court, a copy of the stipulation of co hereto annexed, and under direction of counsel for appella stipulation is hereby certified as a return to the writ of ce herein.

Dated New York, January 10th, 1902.

[Seal United States Circuit Court, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Ci

243 [Endorsed:] United States circuit court of appeals, circuit. Samuel Pine *v.* The Mayor, etc., of New Return to certiorari.

244 [Endorsed:] File No. 18,344. Supreme Court U. S. ber term, 1901. Term No. 491. The City of New *et al.*, petitioners, *vs.* Samuel Pine *et al.* Writ of certiorari turn. Filed Jan'y 13th, 1902.

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In the Supreme Court of the United States. 1

OCTOBER TERM, 1901.

THE CITY OF NEW YORK and BIRD S. COLER, as Comptroller thereof,
Petitioners,
against
SAMUEL PINE and FREDERICK MULLER,
Respondents. 2

Petition for a writ of certiorari requiring the Circuit Court of Appeals, for the Second Circuit, to certify to the Supreme Court for its review and determination the case of Samuel Pine and Frederick Muller, complainants, against the Mayor, Aldermen and Commonalty of the City of New York, defendant.

To the Honorable the Supreme Court of the United States:

The petition of the City of New York and Bird S. 3
Coler, as Comptroller thereof, respectfully shows to this Honorable Court as follows:

First—The City of New York is a municipal corporation, duly incorporated and existing under and by virtue of its ancient charters and of the Laws of the State of New York, and is the successor of another municipal corporation known as the Mayor, Aldermen and Commonalty of the City of New York. Bird S.

4 Coler is the Comptroller of the City of New York and as such is the chief financial officer thereof.

Second—In the year 1896 this suit was begun in the Circuit Court of the United States for the Southern District of New York, in which Samuel Pine and Frederick Muller, citizens of and residents in the State of Connecticut, were complainants, and the Mayor, Aldermen and Commonalty of the City of New York was defendant.

5 During the pendency of the said action and on the first day of January, 1898, the said Mayor, Aldermen and Commonalty of the City of New York, duly incorporated and existing under and by virtue of its ancient charters and certain laws of the State of New York, was consolidated with other municipalities into, and forming a new corporation known and designated as The City of New York.

6 Said consolidation took place under and by virtue of a certain statute, duly enacted, of the State of New York, known as the Greater New York Charter, and as chapter 378 of the Laws of the State of New York, enacted in the year 1897, which became a law on the 4th day of May, 1897, and took effect on January 1, 1898.

Third—The object of this suit, which was in form a bill in equity, was to restrain the City of New York, its officers, agents, attorneys and employes from continuing to build a dam across the West Branch of the 7 Byram river, and from maintaining, or continuing to maintain the same, and from diverting the water of said West Branch, or any part thereof, and from preventing in any way the water from said West Branch, or any part thereof, from flowing through its natural channel at any time.

Fourth—A motion for an injunction *pendente lite* was denied and said denial was affirmed by the United

States Circuit Court of Appeals for the Second Circuit. The case came on to be heard on testimony before the Hon. Nathaniel Shipman, one of the Judges of the said Circuit Court, who, on July 24, 1900, signed a decree granting a perpetual injunction. 8

Error was duly assigned and an appeal taken to the United States Circuit Court of Appeals for the Second Circuit. The said appeal came on to be heard before said Court in March, 1901, the Court consisting of the Hon. William J. Wallace, the Hon. Edward B. Thomas and the Hon. Hoyt H. Wheeler. The said Court, on October 30, 1901, affirmed the said decree, but the Judges were divided in opinion. The prevailing opinion was written by Judge Thomas, Judge Wallace concurring. A dissenting opinion was delivered by Judge Wheeler, who sustained fully the position taken by The City of New York, through its counsel. 9

Fifth—A certified copy of the entire record of the said case in the said Circuit Court of Appeals is herewith furnished as part of this application, in conformity with Rule 37 of this Honorable Court, relative to cases in the Circuit Courts of Appeal, and the same is marked Exhibit "A." 10

Sixth—Your petitioners are advised and believe that the said judgment of the said United States Circuit Court of Appeals is erroneous and that the dissenting opinion of Judge Wheeler correctly expounds the law, and that this Honorable Court should require the said case to be certified to it for its review and determination under and in conformity with the provisions of the Sixth section of the Act of Congress entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, the said case being 11

made final in said Circuit Court of Appeals by said act.

Seventh—Your petitioners are advised and verily believe that owing to the erroneous decision of the said Circuit Court of Appeals and to certain novel and peculiar questions of great general public importance, as well of great special and pecuniary importance to The City of New York and to numerous persons interested, such questions should be set at rest by the decision and judgment of this Honorable Court.

And more particularly your petitioners present the following as a brief statement of the situation and why this Honorable Court should review the subject involved in this litigation and make such decision as may be proper, referring for more extended statements and reasons to the record and brief submitted herewith.

A brief statement of the situation is as follows:

The Byram river is a non-navigable stream of fresh water running into Long Island sound at or near the boundary between the States of New York and Connecticut. Tracing its course up stream from the sound, it for a distance forms the boundary between the States of New York and Connecticut, then deflects to the east and for some three or four miles is entirely within the State of Connecticut, through which it flows through or along the side of the two farms belonging to the complainants. On the northerly boundary of one of these farms (Mr. Muller's) the river divides into two branches, the eastern branch being entirely within the State of Connecticut. Following the western branch up stream we soon come again to the boundary line between the States of New York and Connecticut, beyond which line the said western branch, with all its ponds and tributaries, is entirely within the State of New York.

The City of New York has constructed a dam across 16
the west branch of the Byram river and intends to divert a part of the water of that branch into its water supply and to use the same for the public purposes for which water is used in a great city.

This dam is being built entirely within the State of New York, and the part of the said west branch of the Byram river above said dam is also entirely within the State of New York, the waters thereof having their origin or source entirely within the State of New 17
York.

Acting under the authority of an act of the State of New York known as chapter 445 of the Laws of 1877, with its amendments, the City has acquired through the exercise of the right of eminent domain or by private agreement the right to use this water and to divert the same, and has acquired all rights thereto existing in the State of New York.

It has paid all damages for diversion of the said 18
stream in the State of New York, and has expended on the said dam alone about $45,000, and upon other necessary appurtenances thereto, in order to make the said water a part of its water supply, upwards of $1,000,000.

So that now the City of New York owns and has paid for all private lands, rights or interests in, or belonging to said stream of water, so far as the same exist within the 19
State of New York.

The said branch of the Byram River, a short distance below the said dam, crosses the boundary line between the States of New York and Connecticut, and flows for a distance through the State of Connecticut, emptying finally into Long Island Sound.

The said Westerly Branch is joined in the State of Connecticut by an Easterly Branch, which lies entirely within

20 the latter State. The stream thus formed flows through or along the farms of the complainants.

Only about one-fourth of the water flowing through or along these farms can in any event be diverted by the defendants.

It was claimed by the defendant that nothing more than nominal damage could result. But conceding everything that the complainants can assert, the damages to the
21 complainant Pine would not exceed about $2,000 and to the complainant Muller would not exceed $572.50.

Formerly along the said Byram river in the State of Connecticut were certain mills and water powers which were claimed to be damaged by the said diversion of the water. A settlement has been arrived at with all of these mill owners and the sum of $376,000 or thereabouts has been paid to them in satisfaction of their damages.

22 The City through its duly constituted authorities has at all times been willing and anxious to pay to the complainants any damages which they may suffer from the said diversion of the water, and is willing to submit the ascertainment of said damages to any court or judicial tribunal having jurisdiction of such matters and to forthwith pay such sum as such court or tribunal may determine to be just.

The complainants have refused to make any settle-
23 ment of the said matter, or to receive any just and proper sum in settlement, or to submit the question of damages to judicial determination, insisting upon an injunction perpetually restraining the City from diverting the water.

There are numerous other persons similarly situated who also threaten to enjoin the City from the diversion of the said West Branch of the Byram river.

The question thus presented affects far more im- 24
portant matters even than the Byram river diversion.

The City of New York is now or in the near future will be in great need of an additional supply of water which it can get only from certain streams. Several of these streams, however, although having their origin in the State of New York, eventually flow into other States, and if citizens of those States can enjoin the diversion of water from those streams, and can in no manner be compelled to accept compensation in damages, it would 25
be impossible for the City of New York to make use thereof. It thus becomes of great importance to the City of New York that the law shall be settled upon this question, and upon the determination of this general law, as I am informed and verily believe, depends the policy that shall be adopted by the said City in reference to its future water supply.

If the State of New York is absolutely powerless to authorize municipalities existing under its jurisdiction
to make use of streams of water for public purposes, 26
if the same eventually flow into other States after arising and flowing in the State of New York, then the City of New York is greatly restricted as to the sources of its supply, and it can only make use of such streams and sources as are through their entire course within the State of New York.

Your petitioners are informed and verily believe that there is a dispute between the States of Kansas and
Colorado involving similar questions which dispute is 27
now before the Supreme Court of the United States, in a suit between said states in which suit it is expected that argument will be heard before the said Supreme Court on or about February 26, 1902.

Your petitioners would respectfully suggest that the Court order that argument of this suit be had at or near the same time.

Your petitioners are informed and verily believe that the decision of the majority of the Court below is in conflict with certain decisions of the Federal Courts in the First Circuit and with certain decisions rendered by the Supreme Court of the State of Massachusetts, which decisions are discussed at length in the opinion of the Court below and in the brief of petitioners' counsel herewith submitted.

Your petitioners therefore urge that the questions presented should be answered by the highest Court in the land, as a matter of public policy and public interest, it being important that the question be settled as a guide to the City of New York, and other cities similarly situated, and also because of the great pecuniary loss that will result to said City if the said injunction shall remain in full force and effect.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals, for the Second Circuit, commanding the said Court to certify and send to this Court, on a day certain, to be therein designated a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals in the said case therein entitled "Samuel Pine and "Frederick Muller complainants and appellees against "The Mayor, Aldermen and Commonalty of the City "of New York, defendant and appellant," to the end that the said case may be reviewed and determined by this Court, as provided in section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891, or that your petitioner may have such other or further relief or

remedy in the premises as to this Court may seem proper and in conformity with the said act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court, and your petitioner will ever pray. 32

Dated New York, December 4, 1901.

The City of New York. [L. S.]

33

BIRD S. COLER,
Comptroller of the City of New York.

STATE OF NEW YORK, }
County of New York, } *ss.:*

Bird S. Coler, being duly sworn, deposes and says: 34

I reside in the City of New York, which is a municipal corporation, incorporated and existing under its ancient charters and the Laws of the State of New York.

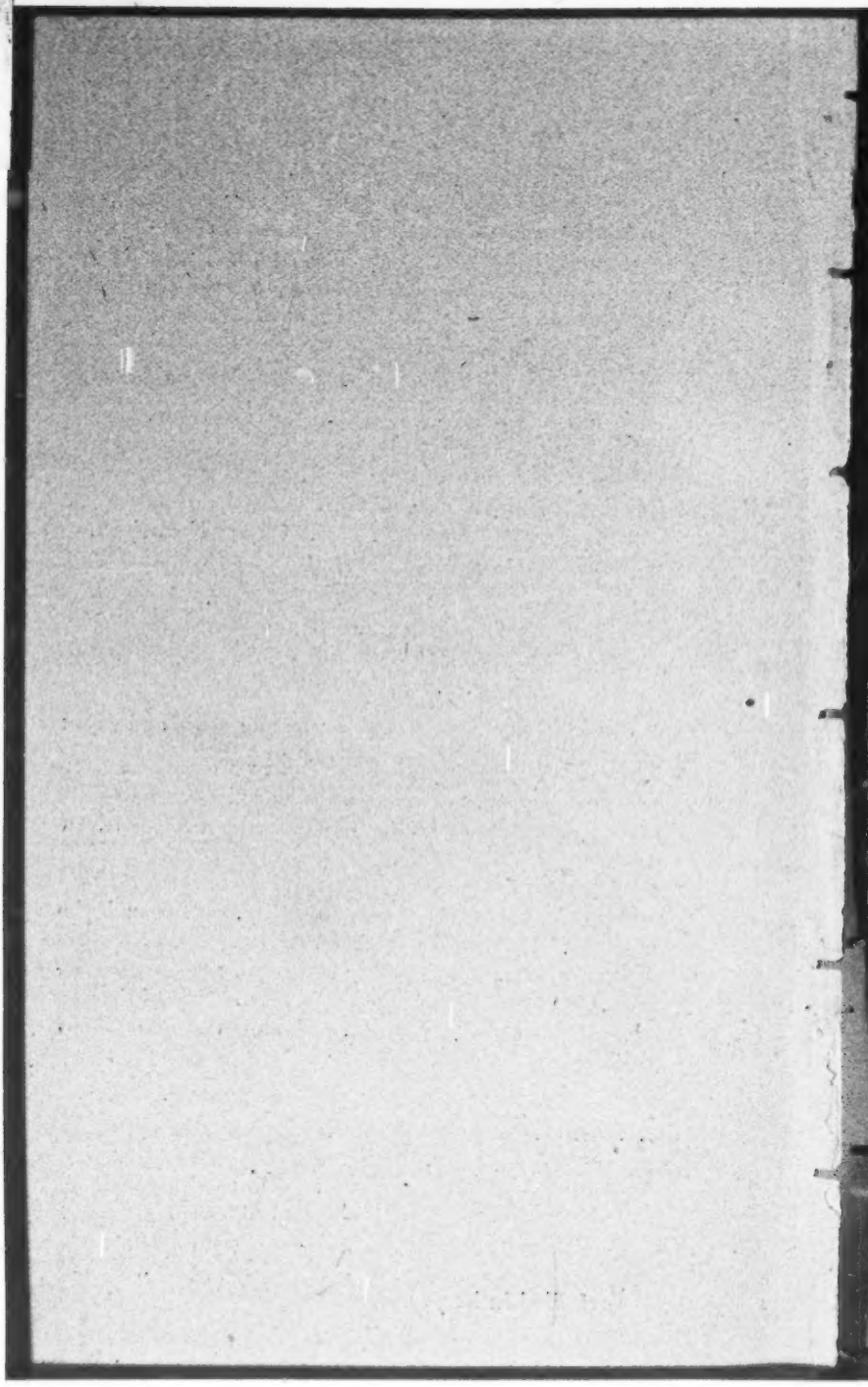
I am the Comptroller of said City, and as such the chief financial officer thereof. I have read the foregoing petition, and the same is true of my own knowledge, except as to such matters as are therein stated upon information and belief, and as to those matters I believe it to be true. 35

BIRD S. COLER.

Subscribed and sworn to before me this 4th day of December, 1901.

R. E. SELMES,
Notary Public,
Kings Co., N. Y.

Cert. filed in N. Y. Co.



No. 491.

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FILED
DEC 6 1901
JAMES H. MCKENNEY,
Clerk.

Brf. of Sterling for Petitioners.

[REG. 49, FOL. 414.]

Filed Dec. 6, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE CITY OF NEW YORK and BIRD S. COLER, as Comptroller thereof,
Petitioners,

against

SAMUEL PINE and FREDERICK MULLER,
Respondents.

491

Statement and points by the Corporation Counsel of the City of New York in behalf of the petitioners on an application for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The decision of the Circuit Court of Appeals for the Second Circuit was rendered on October 30, 1901. This decision was by a divided Court. Judge Thomas wrote the prevailing opinion, Judge Wallace concurring, while Judge Wheeler wrote a dissenting opinion which

sustained fully the position taken by the petitioner, the City of New York.

The gist of the action is to restrain the City of New York from diverting a part of the water of the Byram river from its natural channel into the reservoirs and water supply of the City. The diversion or intended diversion takes place in the State of New York, where the stream has its origin. It eventually flows into Connecticut, and the complainants bring their action as citizens of that State.

As the matter now stands, the City is under a perpetual injunction in the broadest terms absolutely prohibiting it from using any part of the West Branch of the Byram river for its water supply, although all of said West Branch above the point of diversion is entirely within the State of New York, where the said West Branch has its origin. The diversion of this stream has taken place under the authority of certain statutes of the State of New York, purporting to give authority to the City of New York to do the acts complained of.

Large sums of money have been expended by the City of New York in the construction of dams and reservoirs intended to store the water and convey it to the city for public use, relying on the efficacy of these statutes. It has also expended large sums of money in compensating people similarly situated to the complainants for damages they have suffered. It is willing to compensate the complainants for any damages that they have suffered, provided such damages can be agreed upon or ascertained through any competent tribunal.

The complainants, however, insist that they are entitled as of right to a perpetual injunction restraining the said diversion, and will not accept compensation

for damages they may have suffered. Being citizens of Connecticut, they claim that the laws of New York State have no application, and that the contest is really between an upper and lower riparian proprietor, who are both private citizens.

The contest, however, is vastly more important. It relates to public matters of the gravest importance.

If this injunction is to be sustained the following proposition must be held to be true: There is a large amount of property or property rights in a State which are not subject to the exercise of the right of eminent domain by that State, but there is an easement or servitude attached to the same, held or owned by the citizens of another State, which the first State is powerless to do away with, and which render the said property or property rights within its own territory unavailable for itself or its own citizens. In other words, the State in which the said property and property rights are situted does not control the same, but another State or the citizens of that other State.

If the prevailing opinion in the court below is correct, then there is no means known to the law whereby a State can make use for the most necessary public purpose of the water of a stream arising in its own territory, if that stream eventually runs into another State. Any abutting land owner in the other State, no matter how little the diversion of the water may injure him, or perhaps if it does not injure him at all, can immediately enjoin the diversion.

The first State is absolutely powerless, no matter how liberally it may be willing to compensate the citizen of another State, no matter how complete a scheme it may provide through the courts for the payment of damages,—the property owner in the second State need pay no attention to that but may insist upon an injunction.

There would naturally be in a given case large numbers of people affected, some of whom would be very likely to insist upon such exhorbitant prices that it would be impossible or impracticable to settle with them.

The consequences of such a doctrine are evident. The instances through the country where a stream of water arises in one State and eventually flows into another State are legion. The result of the doctrine laid down by the Court below would be that the lower riparian owners in a foreign State absolutely control the use of water for public purposes of the upper riparian proprietors in another State.

A State in which water rises and flows for scores of miles would have no control even for public purposes of the said water, and could not pass laws which would allow diversion of any of this water even for public purposes.

In other words, cities, towns and villages would be unable to use the waters of their own State for purposes of drinking and cleanliness, extinguishment of conflagrations and for such other purposes as water is commonly used.

The laws of one State cannot, of course, authorize the use of the right of eminent domain to acquire title to property in another State, nor are there any laws of the United States which would have that effect.

In the present case the State of New York has done all that it is possible for a State to do in the way of authorizing the acquisition of the right claimed in this case, and has provided a scheme by which compensation must be paid, and the power of the courts, Federal as well as State, is sufficient to enforce payment of whatever damages the plaintiffs may have suffered.

If the decision below is correct then there is a class of property which is exempt from the exercise of the right of eminent domain, a class of property which there is no means of using for public purposes.

It is respectfully submitted that this result must logically follow from the decision of the Court below. A doctrine which arrives at this result we submit with much confidence should be thoroughly examined by the Supreme Court of the United States.

We present to this Court the subject divided into five parts:

PART I.

This Consists of a Statement of Facts.

PART II.

This Consists of a Concise Statement of the Principal Grounds on which we Claim that this Court should Grant the Writ of Certiorari.

PART III.

This Consists of an Argument of the Legal Points Discussed and a Citation of Cases.

PART IV.

This Consists of the Statutes of the State of New York Authorizing the City of New York to Exercise the Right of Eminent Domain, Applicable to the Present Case and is Also Called Appendix I.

PART V.

This Consists of a Digest of all the Testimony and is also Called Appendix II.

PART I.

THIS CONSISTS OF A STATEMENT OF FACTS.

PART I.

The following is a more detailed statement of facts:

The main facts are simple and undisputed and this was true even upon the hearing below. The only dispute, in substance, in the Circuit Court, was whether there was any real damage to the complainants from the diversion of the water.

A digest of all the evidence is added to this brief as Appendix II.

The complainants themselves admitted that they had suffered no substantial damage, and at most the evidence of damage was very unsatisfactory and of an insignificant amount. We do not, of course, expect this Court to go into the question of whether or not there was actual damage, but shall assume the most that the complainants can claim to wit, that they did suffer a small amount of damage by the diversion of the water.

The complainants are citizens of and residents in the State of Connecticut, and owners in fee, respectively, of two farms situated in that State on the Byram river. The defendant is a municipal corporation of the State of New York, and as such a citizen of that State, so that the Court below acquired jurisdiction if at all by virtue of the fact that the parties were residents of different States.

The Byram river is a non-navigable stream of water flowing into Long Island Sound. Tracing its course upstream from the Sound, it for a distance forms the boundary between the States of New York and Connecticut, then deflects to the east and for some three or four miles is entirely within the State of Connecticut, during which it flows through or along the side of the two farms belonging to the complainants.

On the northern boundary of Mr. Muller's farm the river divides into two branches, the Eastern Branch being entirely within the State of Connecticut. Following the Western Branch upstream we soon come to the boundary line between the States of New York and Connecticut, beyond which line the said West Branch with all its ponds and tributaries is entirely within the State of New York. The City of New York, acting under authority of the Legislature of the State of New York at the time of the institution of the suit, was building a dam across the said West Branch entirely within the State of New York and about 700 feet from the Connecticut line, the effect of which dam when completed would be to divert a a part and at certain times perhaps all of the water of the said West Branch of the Byram river having its origin above the said dam from its natural channel into the pipes, reservoirs and water supply of the City of New York.

Such action would, of course, to some extent lessen the natural flow of the stream past the complainant's property, but the East Branch would be entirely uneffective and also part of the West Branch originating below the City's dam, so that the complainants could not be deprived of more than about one-quarter, as shown by the testimony, of the natural flow of the Byram river.

It is alleged that the complainants and each of them would be damaged to the sum of $2,400 and more by the alleged illegal diversion of the water, and hence they pray for an injunction restraining the defendant, its officers and agents, from building the said dam and from maintaining or continuing to maintain the same, and from diverting the water.

The defendant alleges that the intended diversion of the water would cause little if any injury and damage to

the complainants, and alleges in effect, that it has taken proceedings to acquire title to large quantities of land in the vicinity for constructing dams, aqueducts, reservoirs and other structures necessary for its supply of water, and has expended upwards of $30,000,000 in providing for said water supply. It avers that the dam will be of great and permanent benefit to the City of New York and its residents, and to all persons dwelling therein, and *avers that it is and always has been amply able and willing to pay any damages that the complainants may suffer from being deprived of the water that naturally comes from the said West Branch of the Byram river.*

THE DECREE OF INJUNCTION APPEALED FROM IS AS FOLLOWS:

"This cause came on to be heard at a Term of "the United States Circuit Court for the Southern "District of New York, and was argued by coun- "sel and thereupon, upon consideration thereof, "it is

"Ordered, adjudged and decreed as follows, to "wit:

"That the complainants in this suit and each of "them are entitled to the injunction order of this "Court restraining the defendant, its successors "and assigns, their and its officers, agents and em- "ployees, each, all and any of them, from diverting "the water or any part of the water of the West "Branch of the Byram river or any part of the "water of the Byram river, or in preventing in any "way said water or any part thereof, at any time "from flowing through its natural channel, before, "at and below the junction of the two branches of "said river; and it is further

"Ordered, adjudged and decreed that the de- "fendant, its successors and assigns, their and its

" officers, agents and employees, each, any and all of " them, be and they and each of them are hereby " perpetually enjoined from diverting the water or " any part of the West Branch of the Byram river, " or any part of the water of the Byram river, or " in preventing in any way said water or any part " thereof at any time from flowing through its nat- " ural channel, before, at and below the junction " of the two branches of said river, and it is further

" Ordered, adjudged and decreed, that a writ of " injunction do issue on the first day of November, " in the year nineteen hundred, against the defend- " ant, its successors and assigns, their and its " officers, agents and employees, and each, any and " all of them, commanding them to comply with " all and singular the premises, matters and things " so enjoined upon them, and it is further

" Ordered, adjudged and decreed, that the com- " plainants, and each of them, recover their costs " in the premises, to be taxed by the Clerk of this " Court.

" Dated July 24, 1900.

" N. SHIPMAN,
" Circuit Judge."

The injunction is thus in the broadest terms, and, if sustained, the City will be absolutely prohibited from using any part of the West Branch of the Bryan river for its water supply, although all of it above the dam is entirely within the State of New York, where the said West Branch has its origin.

Elaborate statutory provisions have been enacted by the Legislature of the State of New York, giving the City of New York the power to exercise the right of eminent domain, in order to secure the right to this water for the City's water supply.

Provision is made for the payment of damages, and, as appears by the testimony, large expenditures have been made for that purpose, and so far as appears, in a manner entirely satisfactory to the landowners within the State of New York, as well as to many landowners in the State of Connecticut who have been settled with privately.

It appears from the testimony that the City "has paid all damages for the diversion of the stream above the Connecticut State Line to this water right" (fol. 55). It also appears from the testimony that the City has settled with millowners and with parties who own land contiguous to the stream on both sides in the State of Connecticut, and has paid $379,000 for that purpose.

It also appears that the City has taken nothing but the use of the water. It has not attempted to condemn or take any land in the State of Connecticut. It also appears from the testimony that the cost of the dam in the State of New York alone without any of its appurtenances was about $49,000, and that the cost of getting the water to New York, that is, the building of the dam and the whole matter, would be upwards of $1,000,000.

If this injunction is to stand, all of this money has been thrown away, and its expenditure has been of no use to the City of New York. It means the loss of some $1,500,000, and a substantially diminution of its water supply, already inadequate.

The statutes of the State of New York authorize the exercising of the right of eminent domain cannot, of course, operate directly upon the land in the State of Connecticut so as to authorize the acquisition of title thereto, and hence both the City of New York and the State of New York are powerless to acquire by the exercise of the right of eminent domain the lands or water

rights, if any, that the complainants have in connection with their land in the State of Connecticut.

If this injunction is sustained then any State of the United States can be absolutely prohibited from using, even for its own purposes, or for the public purposes of any municipal corporation within its sovereignty, any non-navigable stream of water having its origin and flow entirely in that State, for the most necessary public purposes, if such stream eventually finds its way into another State whose landowners may, even in the slightest degree be injured by a diversion of the water, and indeed if they are not injured at all, as some assert.

No matter how liberally the State or City might be willing to compensate such landowners, it would be entirely at their mercy, and it does not need any great knowledge of human nature to enable one to see that such a power would be made use of in such a way as to practically prohibit the use of the water.

The City of New York in building this dam and diverting the water is acting under authority of the State of New York, and has the entire power of that State in the premises.

To say that the City of New York cannot build this dam and divert the water is equivalent to saying that the State of New York cannot do it.

It is to be remembered that all we are contending for in this suit is that the special remedy by injunction shall not be enforced.

We are not maintaining that the complainants have no action for damages. That is an entirely different proposition. We shall concede that the complainants are entitled to recover in an action in the courts of the State of New York, or in the Circuit Court of the United States whatever damages they can show they have sustained.

We contend that the complainants have not an absolute right to an injunction, that they cannot refuse to avail themselves of the other remedies which the law allows, and insist upon an injunction involving enormous pecuniary loss to the defendant and great public injury and inconvenience, the only loss or injury to themselves being small, and which can be easily compensated for in damages, which damages the defendants are willing and ready to pay.

It was written by the Supreme Court of Pennsylvania in *Robb* vs. *Carnegie*, 145 *Penn. St.*, 324, as follows :

> " *An injunction is not of right but of grace, and* " *will never be issued by a Court of Equity when it* " *will inflict a greater injury than it will prevent.* " *In such a case the injured party will be left to his* " *redress at law.*" (See under our Fourth Point below).

PART II.

THIS CONSISTS OF A SHORT STATEMENT OF THE PRINCIPAL GROUNDS ON WHICH WE CLAIM THAT THIS COURT SHOULD GRANT A WRIT OF CERTIORARI.

PART II.

The principal grounds on which we claim that the Court should grant a writ of certiorari are:

(1) The United States Circuit Court of Appeals is not unanimous in its decision, Judge Wheeler dissenting therefrom and sustaining fully the position taken by the City, which is also sustained as we claim by decisions of Federal Courts in the First Circuit and by the Massachusetts Supreme Court (see under our Eighth Point).

(2) The subject-matter of the litigation is peculiarly within the province of the Supreme Court of the United States. While the suit is technically between citizens of one State and a municipal corporation of another State, it is in reality a suit by citizens of one State against another State, and we intend to argue as we did below that the Circuit Court was without jurisdiction. Indeed, it might be said that in some of its bearings the case is practically between two States, a dispute of which this Court has original jurisdiction.

(3) The questions involved are of great public importance. A similar situation may arise elsewhere in the State of New York, or in countless other places throughout the United States. The questions raised are, therefore, of general public interest and should be set at rest by this Court as a matter of public policy, and to avoid loss and litigation throughout the country. If the decision below is correct a class of property exists which is exempt from the exercise of the right of eminent domain.

(4) THE MATTERS INVOLVED ARE OF GREAT PECUNIARY IMPORTANCE TO THE CITY OF NEW YORK IN THIS PARTICULAR CASE. IF THIS INJUNCTION IS TO REMAIN IN FORCE THE CITY HAS LOST UPWARDS OF ONE AND ONE-HALF MILLIONS OF DOLLARS, UNLESS, INDEED, IT CAN "BUY OFF" THE COMPLAINANTS AND OTHERS SIMILARLY SITUATED, ON THEIR OWN TERMS AND WITHOUT ANY JUDICIAL DETERMINATION OF THE DAMAGES THAT THEY HAVE SUFFERED.

(5) THE MATTERS INVOLVED ARE OF GREAT IMPORTANCE TO THE CITY OF NEW YORK AND ITS CITIZENS, BECAUSE OF THEIR BEARING UPON OTHER PROJECTS FOR PROCURING AN ADDITIONAL WATER SUPPLY.

IF THE OPINION OF THE MAJORITY OF THE COURT BELOW IS CORRECT, THE CITY OF NEW YORK IS GREATLY RESTRICTED AS TO ITS SOURCES OF WATER SUPPLY, AND SOME OF THE MOST AVAILABLE CANNOT BE MADE USE OF BECAUSE THE STREAMS FLOW INTO OTHER STATES AND UNDER THE PRINCIPLES OF THE DECISION BELOW AN INJUNCTION WOULD IMMEDIATELY LIE TO RESTRAIN SUCH USE.

(6) THE VITAL QUESTIONS IN THIS CASE ARE NOVEL ONES. IT WAS CONCEDED BY COUNSEL FOR BOTH PARTIES BELOW THAT NO ADJUDICATION COULD BE FOUND THAT IF FOLLOWED AS A PRECEDENT WAS CLEARLY DECISIVE OF THE PRESENT CASE.

THERE IS NOW PENDING, WE ARE INFORMED, IN THIS COURT, A SUIT BETWEEN THE STATES OF COLORADO AND KANSAS INVOLVING VERY SIMILAR QUESTIONS TO THE ONES NOW UNDER CONSIDERATION, AND THE PETITIONERS RESPECTFULLY SUBMIT THAT THIS COURT SHOULD TAKE INTO CONSIDERATION THEIR CASE AS BEING INVOLVED WITH OR AS A PHASE OF THE QUESTIONS IN LITIGATION IN THE COLORADO AND KANSAS DISPUTE.

(7) IT IS SUBMITTED ALSO, WITH ALL DEFERENCE, THAT, A FUNDAMENTAL ERROR OF THE COURT BELOW EXISTS IN DECIDING THE CASE MAINLY AS IF IT WERE BETWEEN PRIVATE

INDIVIDUALS, AND AS IF QUESTIONS OF THE RIGHT OF EMINENT DOMAIN AND OF PUBLIC INTEREST WERE SUBSIDIARY. IT HAS NOT IN ITS OPINION FULLY TREATED THE GREAT PUBLIC QUESTIONS RAISED UNDER OUR FIFTH AND SIXTH POINTS BELOW, NOR THE QUESTION OF JURISDICTION, AND, FURTHERMORE, IT HAS, WE SUBMIT WITH ALL DEFERENCE, INSTEAD OF FOLLOWING THE DECISIONS OF THE MASSACHUSETTS COURTS AND THE DECISIONS OF THE FEDERAL COURTS ON QUESTIONS THAT HAVE ARISEN IN THAT AND ADJOINING STATES, DISTINGUISHED THEM FROM THE PRESENT CASE, AND THUS BROUGHT INTO CONFLICT THE DECISIONS OF THE FEDERAL COURTS IN THE FIRST CIRCUIT WITH ITS OWN DECISION IN THE SECOND CIRCUIT. IT IS OUR CLAIM THAT IF THE DECISIONS IN THE FEDERAL COURTS OF THE FIRST CIRCUIT AND IN THE MASSACHUSETTS STATE COURTS HAD BEEN FOLLOWED INSTEAD OF DISTINGUISHED, THERE WOULD HAVE RESULTED THE ADOPTION OF THE PRINCIPLES LAID DOWN BY JUDGE WHEELER INSTEAD OF THOSE LAID DOWN BY THE MAJORITY OF THE COURT.

PART III.

THIS CONSISTS OF AN ARGUMENT OF THE LEGAL POINTS DISCUSSED AND A CITATION OF CASES.

FIRST POINT.

The Court below had no jurisdiction to grant the injunction. The Court has in effect assumed to enjoin a State at the suit of citizens of another State.

As already stated, and shown more at length under our subsequent points, the State of New York in building this dam and diverting water is acting under authority of the State Legislature. It is not claimed that the City has done anything more than what the State has authorized it to do. The act complained of has been done within and upon the territory of the State of New York, and the State of New York has given, through its Legislature, all the power it can give to do the act complained of. What the City has done it has done as the agent of the State; that is, it is the act of the State itself, and hence this action should be treated as an action of the citizens of one State against the State itself. The fact that the State is not a party on the record makes no difference.

In re Ayres, 123 *U. S.*, 443, it was held that whether a State is an actual party within the meaning of the Eleventh Amendment of the Constitution is to be determined by a consideration of the nature of the case presented by the whole record, and not in every case by a reference to the nominal parties to the record, and numerous other authorities might be cited.

An injunction here means an injunction against the State of New York, forbidding it to exercise the right of eminent domain within its own limits on giving compensation. An injunction would only lie if the acts authorizing the exercise of the right of eminent domain were unconstitutional.

It might be suggested that under the clause in the Fifth Amendment to the Constitution of the United

States, to wit, no person shall * * * "be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation," a State statute which operated to deprive a person of his property without just compensation would be unconstitutional.

We think it clear, however, that under the said statutes of the State of New York, ample means are provided whereby the complainants in this case can secure adequate compensation. There are, first, the provisions of the Statute of 1877, which, we believe, of themselves would be ample to give the complainants an action for damages against the City of New York in the courts of the State of New York, through which they could recover sufficient compensation; or secondly, should the plaintiffs prefer to sue in the Federal courts, they could do so, and by virtue of their being residents of the State of Connecticut they could recover whatever damages to the Court should seem proper.

We think, further, that by virtue of common-law principles, independent of any statute, an action would lie in this Court for damages, which would afford adequate compensation.

Furthermore, we think that the complainants, having brought their action in the Circuit Court of the United States, and the defendants offering to submit to any mode of ascertaining damages that to the Court might seem proper, and to pay such damages, an injunction would not lie, at any rate, until after the damages shall have been ascertained and the City shall have refused, for a reasonable time, to pay the same.

The above propositions are involved in the discussion, and cases elsewhere in this brief, and we will not pursue them further here.

SECOND POINT.

We state under this head what we consider to be the common law relating to the diversion of water from a non-navigable stream, where there is no question as to governmental or public rights.

The law is thus laid down by Chancellor Kent in volume 3 of his Commentaries, at page 439:

> "Every proprietor of lands on the banks of a "river has naturally an equal right to the use of "the water which flows in the stream adjacent to "his lands as it was wont to run (*currere solebat*) "without diminution or alteration. No proprie- "tor has a right to use the water to the preju- "dice of other proprietors above or below him, "unless he has a prior right to divert it or a "title to some exclusive enjoyment. He has "no property in the water itself, but a sim- "ple usufruct while it passes along. *Aqua currit* "*et debet currere ut currere solebat* is the language "of the law. Although he may use the water "while it runs over his land, as an incident to the "land, he cannot unreasonably detain it, or give it "another direction, and he must return it to its "ordinary channel when it leaves his estate. "Without the consent of the adjoining proprietors "he cannot divert or diminish the quantity of "water which would otherwise descend to the "proprietors below, nor throw the water back "upon the proprietors above without a grant, or "uninterrupted enjoyment of twenty years, which "is evidence of it."

This statement of the law is quoted with approval and stated to be undoubted, and to be the rule in those States

in the Union which have simply adopted the common law, in

United States vs. *Rio Grande Co.*, 174 U. S., 690 (1899).
Atchison vs. *Peters*, 20 Wall, 507.

An illegal diversion of water is technically a private nuisance, the remedy at common law being damages to be recovered in an action, in trespass on the case generally, and Courts of Chancery also have concurrent jurisdiction.

Gardner vs. *Newburg*, 2 Johns. Ch., 162.
Merritt vs. *Brinkerhoff*, 17 Johns 306.
Crooker vs. *Bragg*, 10 Wend., 260.
Wadsworth vs. *Tillotson*, 15 Conn., 366.

There are innumerable cases on the subject, but it is unnecessary in our judgment to refer to them at length.

There is no substantial difference between the learned counsel for the complainants and ourselves on this phase of the subject.

The principal cases have been cited in the late and important case of

Strobel vs. *Kerr Salt Co.*, 164 N. Y., 303 (1900). (Motion for reargument denied, 165 N. Y., 15.)

The following is from the opinion in the *Strobel* case :

" A riparian owner is entitled to a reasonable " use of the water flowing by his premises in a " natural stream, as an incident to his ownership " of the soil, and to have it transmitted to him " without sensible alterations in quality or un- " reasonable diminution in quantity."

" While he does not own the running water, he " has the right to a reasonable use of it as it passes

"his land. As all other owners upon the same "stream have the same right, the right of no one is "absolute, but is qualified by the right of others to "have the stream substantially preserved in its "natural size, flow and purity, and to protection "against material diversion or pollution. This is "the common right of all, which must not be inter- "fered with by any. The use by each must, there- "fore, be consistent with the rights of the others "and the maxim of *sic utere tuo* observed by all. "The rule of the ancient common law is still in "force: *aqua currit et debet currere, ut currere "salebat.*

"Consumption by watering cattle, temporary de- "tention by dams in order to run machinery, irriga- "tion, when not out of proportion to the size of the "stream, and some other familiar uses, although, in "fact, a diversion of the water, involving some loss, "are not regarded as an unlawful diversion, but are "allowed as a necessary incident to the use in order "to effect the highest average benefit to all the ripa- "rian owners. As the enjoyment of each must be "according to his opportunity, and the upper owner "has the first chance, the lower owners must submit "to such loss as is caused by reasonable use. Sur- "rounding circumstances, such as the size and veloc- "ity of the steam, the usage of the country, the "extent of the injury, convenience in doing business, "and *the indispensable public necessity of cities and "villages for drainage* are also taken into considera- "tion, so that a use which under certain circum- "stances is held reasonable, under different circum- "stances would be held unreasonable. It is also ma- "terial, sometimes, to ascertain which party first "erected his works and began to appropriate the "water" * * * (citing numerous cases).

"The question of reasonable use is generally a "question of fact, but whether the undisputed "facts and the necessary inferences therefrom "establish an unreasonable use is a question of "law."

* * * * * *

"It does not follow from these views that if upon "another trial the facts are unchanged the defendant "and the other salt manufacturers will be compelled "to make such terms as they can, for a court of "equity with its plastic powers can require as a con- "dition of withholding a permanent injunction the "construction of a reservoir on the upper sources of "the stream to accumulate water when it is plentiful "for use in times of scarcity and thus neutralize the "diminution caused by the manufacture of salt. That "court may also require, on the like condition, "greater care in preventing the escape of salt water "and salt substances into the stream, as the defend- "ant attempted to do during the trial, and thus "prevent or minimize the pollution."

It should be observed that some of the views expressed in the opinion in the *Strobel* case are not in harmony with the decisions of the Pennsylvania Supreme Court and of the Indiana Supreme Court.

See—

Pennsylvania Coal Co. vs. *Sanderson*, 113 Penn., 126 (1886).
Robb vs. *Carnegie*, 145 Penn., 324 (1889).
Barnard vs. *Sherley*, 135 Ind., 547 (1893).

We intend to return to the cases just cited hereafter.

THIRD POINT.

If this case were to be considered as between private individuals merely, the complainants should be left to their remedy at law, and the bill should be dismissed for want of equity, and under section 723 of the Revised Statutes. There is no satisfactory evidence of any damage. Until actual damage has been shown by the verdict of a jury, an injunction should not be granted.

The early practice was that a bill in chancery would not be sustained to try and settle the legal right to a water course or to enjoin the use thereof, until after the legal right had been first settled in an action at law.

Prentiss vs. *Larned*, 11 Vt., 135 (1835).
Marble and Slate Co. vs. *Adams*, 46 Vt., 496 (1874).

The distinction between law and equity in such matters has been carefully preserved by the United States statutes relating to the Federal courts.

In the United States Revised Statutes, section 723, it is provided as follows:

> "Suits in equity shall not be sustained in either
> " of the courts of the United States in any case
> " where a plain, adequate and complete remedy
> " may be had at law."

It is true that this section is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy (*Boyce* vs. *Grundy*, 3 *Peters*, 210; *Tyler* vs. *Savage*, 143 U. S., 79, 95).

The said statute, however, shows a clear intent on the part of Congress that the remedies of equity should

not be allowed to supersede the common law. One of the objects of this statute was to insure the preservation of the right to a jury trial.

Grether vs. *Wright*, 75 *Fed. Rep.*, 742.
In re Foley, 76 Fed. Rep., 390.

It is to be observed here that many of the State court decisions, particularly those of New York, are not applicable as to the remedy by injunctions in this court because of the abolition of the distinctions between law and equity in pleading and practice.

"The remedies in the Courts of the United States "are at common law or in equity, not according to "the practice of State Courts but according to the "principles of common law and equity as distinguished "and defined in that country from which we derive our "knowledge of those principles, and although the "forms of proceedings and practice in the State Courts "shall have been adopted in the Circuit Court of the "United States, yet the adoption of the State practice "must not be understood as confounding the principles "of law and equity; nor as authorizing legal and "equitable claims to be blended together in one suit."

The above quotation is from *Thompson* vs. *Railroad Companies*, 6 Wall., 134; see also 1 *Desty Fed. Proc.*, p. 355.

This Federal statute, and the numerous decisions which might be cited thereunder, are important here, for the reason that the evidence as to actual damage is exceedingly vague and unsatisfactory, and if this injunction stands, the defendants have been deprived of a trial by jury on the question whether or not the complainants have suffered any damages (see digest of evidence on pp. 7–31 of this brief).

There is no doubt that the action would not lie without proof of damage (*Gould on Waters*, sec. 206). Furthermore, the City, having acquired the rights of all owners of rights to the water in the State of New York, has become itself, in effect, an owner, and entitled to such uses of the water as its predecessors had. It may well be that all of these predecessors together would have been entitled to divert all that the City diverts. A riparian proprietor has a right to the ordinary use of water flowing past his lands, including the use of the same for domestic purposes, such as drinking, washing, cooking, or for his stock. The City by succeeding to the rights of riparian owners has thus become entitled to a certain reasonable use of the water, even extending to the consuming of a reasonable quantity thereof, and it is therefore incumbent upon the complainants to show that such use of the water is unreasonable and also results in damage to them. Questions of this sort are peculiarly within the province of a jury—certainly in a case like the present one, where the evidence is of an exceedingly vague and shadowy character, upon which a jury might well find that no damage has been suffered by the complainants.

The following is from section 206 of *Gould on Waters*.

> "In view of the varying rights of different
> "riparian owners on the same stream, injunctions
> "should not be granted to regulate such rights
> "except in clear cases of intentional violation."

A good case illustrating this principle is *Earl of Sandwich* vs. *The Great Northern R. Co.*, *L. R.*, 10 Ch. Div., 707 (1878). This is the case of a railroad compano which took water from a stream for supplying its engines and for the general purposes of the station.

On a bill filed by a mill-owner lower down the stream, it appeared that the abstraction of water did no damage

in wet weather and never shortened the working of the mill for more than a few minutes a day. It was held that the company, as riparian owners, were entitled to take a reasonable quantity of water for their purposes, and the quantity taken was reasonable.

This decision, however, is perhaps not entirely consistent with *Garwood* vs. *N. Y. C. & H. R. R. Co.*, 83 N. Y., 400.

The following cases may be cited on the proposition that whether a particular use of water is reasonable or not is a question of fact for a jury.

Prentice vs. *Geiger*, 74 N. Y., 341.
Colrick vs. *Swinburne*, 105 N. Y., 503.
Strobel vs. *Kerr Salt Co.*, 164 N. Y., 303.
Bullard vs. *Saratoga Victory Mfg. Co.*, 77 N. Y., 525.
Wadsworth vs. *Tillotson*, 15 Conn., 366.

We call particular attention to the following case, to wit:

Parker vs. *Winnipiseogee Co.*, 2 Black, 545 (1862).

This was a suit in equity to enjoin an alleged nuisance, consisting in interference with the flow of waters from a lake. The defendant corporation was attempting to secure more abundant and regular supply of water for the mills at Lowell and Lawrence, and this was to be accomplished by making the lake a vast reservoir of water, to be accumulated and maintained in wet weather, and to be drawn off and passed down the stream as it might be needed in dry weather. The defendant had bought up all the water rights relating to the lake, and had settled with numerous persons who claimed to be injured by the action of the defendants, and had offered the same amount to the plaintiffs, who refused the same, seeking to extort an unreason-

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able and unconscionable sum. The company had also spent large sums of money in improvements.

The following is from the opinion:

"We have failed to find those clear facts of right "upon one side and wrong upon the other, which "are necessary to quicken into activity the powers "of a court of equity. We forbear to pursue this "inquiry because the case presents another ground "free from doubt upon which we prefer to rest our "decision.

"It was urged at hearing, as an insuperable ob- "jection to the relief prayed for, that the appellant "has not established his right by an action at "law. The objection was not taken by demurrer "or in the answer. In the courts of the United "States, it is regarded as jurisdictional and may "be enforced by the Court *sua sponte*, though not "raised by the pleadings nor suggested by the "counsel. 2 Cr., 419; 5 Pet., 496; 2 How., 383.

"The 16th section of the Judicial Act of 1789 "provides 'that suits in equity shall not be sus- "'tained in either of the courts of the United States "'in any case where plain, adequate and complete "'remedy can be had at law.' This is merely de- "claratory of the pre-existing rule, and does not "apply where the remedy at law is not 'plain, "'adequate and complete'; or, in other words, "where it is not 'as practical and as efficient to "'the ends of justice and to its prompt administra- "'tion as the remedy in equity.' 3 Pet., 205. But "where the remedy at law is of this character, the "party seeking redress must pursue it. In such "case, the adverse party has a constitutional right "to a trial by jury. 19 How., 278. The concurrent "jurisdiction of courts of equity in cases of private

"nuisance, dates back to an early period in the "growth of the English equity system. * * * It "has been greatly enlarged since the time of Lord "Thurlow. * * * It is now too firmly established "to be shaken, but is not without limitation. It "is governed by the same principles which animate "and control its action in other cases where its "aid may be invoked against a wrongdoer. "Many cases of private nuisance will sustain an "action at law which will not justify relief in "equity. * * * A court of equity will interfere "when the injury by the wrongful act of the ad- "verse party will be irreparable as where the laws "of health, the laws of trade, the destruction of "means of subsistence or the ruin of property "must ensue. * * * It will also give its aid to "prevent oppressive and interminable legislation, "or a multiplicity of suits, or where the injury is "of such a nature that it cannot be adequately "compensated by damages at law, or is such as "from its continuance or permanent mischief must "occasion a constantly recurring grievance which "cannot be prevented otherwise than by an in- "junction * * * A diminution of the value of "the premises without irreparable injury is no "ground for interference. * * * *Where an in- "junction is granted without a trial at law it is "usually upon the principle of preserving the property "until a trial at law can be had.* A strong "*prima facie* case of right must be shown and there "must have been no improper delay. The "Court will consider all the circumstances "and exercise a careful discretion. * * * "Until the rights of the parties are settled at law "only a temporary injunction is issued to prevent "irreparable injury. * * * This jurisdiction "is applied only where the right is clearly estab- "lished—where no adequate compensation can be

"made in damages and where delay itself would "be wrong. * * * The case must be one of "strong and imperious necessity or the right must "have been previously established at law. * * * "If the evidence be conflicting and the injury "doubtful, this extraordinary remedy will be with- "held. * * * After the right has been estab- "lished at law a Court of Chancery will not, as of "course, interpose by injunction. It will consider "all the circumstances, the consequences of such "action, and the real equity of the case. * * * "He (the complainant) does not allege either "danger of irreparable injury, or of protracted "litigation, or of a multiplicity of suits as the "ground upon which he seeks relief in equity. "There is no warrant for such averment. If he "has been injured his injury can be ascertained "and fully repaired by damages in an action of "law. As a jury is the tribunal provided by law "to determine the facts and to fix the amount, "they can best perform this duty, The fact that "other proprietors have been paid bears upon "this point; 8 E. L. & E., 222-223. *The appellant "can have no standing in a court of equity until he "has laid this foundation for relief. This objection "is fatal to the case. We decide nothing else.*

"There are cases in which a court of equity will "take jurisdiction and give a complete remedy "without the previous intervention of a court of "law. * * * But this case does not belong to "that class."

Hence the decree of the Circuit Court dismissing the bill was affirmed.

Following the *Parker* case is

Consolidated Canal Co. vs. *Mesa Canal Co.*, 177 U. S., 296 (1900).

This was a suit to restrain the defendant from maintaining in its canal a dam in such a way as to impede the flow of water in complainant's canal or to destroy a certain water-power claimed by the complainant.

A part of the finding of the Court below was as follows:

"A further result of the erection of the water in "appellant's canal below the division gates was to "*very slightly, if at all*, impede the flow of water in "appellant's canal above the division gates and "thereby detract very slightly from the carrying "capacity of appellant's canal.

"The cost of the reconstruction of the canal from "Ayres' head gate to the division gates exceeded "ten thousand dollars, and the water power created "at the fall was about equal to about forty horse-"power."

BREWER, *J:*

"In view of the finding of the Supreme Court we "need not stop to consider any question in respect "to the influence of the dam placed by appellee "upon the flow of water in appellant's canal, and "this, notwithstanding the fact that in the trial of "the case much of the testimony, pro and con, was "in reference to that matter, we are concluded as "to the question of fact by the finding, *and it is* "*familiar law that injunctions will not issue to* "*enforce a right that is doubtful, or to restrain an* "*act the injurious consequences of which are merely* "*trifling.*

FOURTH POINT.

Still treating this case as between private individuals or corporations merely, an injunction should not be granted if the decisions cited below in the Supreme Courts of Pennsylvania and Indiana have adopted the correct principles of law.

The Pennsylvania and Indiana Courts, and perhaps the courts of other states, have adopted certain principles, as shown in the cases cited below, which are not in harmony entirely with the New York decisions on certain points as stated by Judge Vann in

Strobel vs. *Kerr Salt Co.*, 164 Y. N., 303.

These principles were, however, adopted after elaborate argument and much difference of opinion among the judges and are entitled to great weight before this Court.

The doctrine of the Pennsylvania and Indiana Courts may be stated as follows generally:

The use and enjoyment of a running stream for domestic purposes by lower riparian proprietors must *ex necessitate* give way to the interests of the community in order to permit the development of the natural resources of the country and to make possible the prosecution of a lawful business, as for instance, that of mining coal.

An injunction should not issue but persons should be left to their remedy at law.

> " *An injunction is not of right but of grace, and*
> " *will never be issued by a Court of Equity when it*
> " *will inflict a greater injury than it will prevent.*
> " *In such a case the injured party will be left to his*

"*redress at law*" (from opinion in Robb case, cited below.

The doctrine of the cases about to be cited applies *a fortiori* to the case before this Court, where vast public interests are involved, and where the injunction that has been allowed in effect forbids any State of the Union to use or authorize its own municipal corporation to use water, the most necessary thing to life next after air, if such use results in injury to a person owning lands in another State. Such person would hold in his own hands control of the resources of an entire State.

Pennsylvania Coal Co. vs. *Sanderson*, 113 Penn. St., 126 (1886).

This was an action on the case to recover damages for loss of a stream of water which flowed through the plaintiff's grounds and was rendered entirely useless for domestic purposes by the defendant's discharging the water into it, which they pumped from their coal mines. This was the fourth time the case had been before the Supreme Court of Pennsylvania, and the law involved was the subject of long argument and careful consideration.

A verdict for substantial damages was rendered in favor of the plaintiff, and the case came before the Supreme Court of Pennsylvania on a writ of error. This judgment was reversed. It was held that one operating a coal mine in the ordinary and usual manner, may, upon his own lands, drain or pump the water which percolates into his mine into a stream which forms the natural drainage of the basin in which the mine is situated, although the quantity of the water may thereby be increased, and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners.

The use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners who purchased their land, built their houses and laid out their grounds before the opening of the coal mine, the acidulated waters from which renders the same entirely useless for domestic purposes must, *ex necessitate*, give way to the interests of the community in order to permit the development of the natural resources of the country and to make possible the prosecution of the lawful business of mining coal.

The law as thus laid down has been frequently followed in later cases in the Pennsylvania courts.

One of the principal ones is *Robb* vs. *Carnegie*, 145 Penn. St., 324 (1889).

This was an action in trespass on the case to recover damages for injuries to the plaintiff's land arising from the operation of certain coke ovens by the defendants.

It was held that while the owner of property is without legal redress for the effect upon its desirability and market value of the mere proximity of an undesirable business, yet if the business be so conducted as to affect the use of his property, or the health of its occupants, these tangible and substantial injuries capable of measurement by a pecuniary standard will sustain an action for damages.

It was further held, after discussing how far the *Sanderson* case was applicable to certain propositions, that, at all events, one who is engaged in manufacturing coke from coal not mined by himself, but purchased at mines of other persons remote from the land on which the manufacturing is done, will be liable in damages for a substantial injury to the crops and soil of an adjoining farm caused by the smoke and vapors emitted from its ovens as a neces-

sary incident of their operation. It was further held that while such a business, conducted in a careful manner upon a proper site, *will not be enjoined by equity* (Huckenstine's App., 70 Pa., 102), *yet one who is substantially injured thereby is entitled to redress at law.*

The following is from the opinion of the Court:

"We think it is true, as held by the judge of the "court below, that the evidence in this case would "not justify an injunction. It shows a selection of "a site as well adapted to the business and as remote "from dwellings as any in that region. To enjoin the "manufacture of coke at such a site would amount "to a prohibition of its manufacture and the de-"struction of vast allied and dependent industries of "immense value to the public as well as to those "directly engaged in them. *An injunction is not of "right but of grace, and will never be issued by a "court of equity when it will inflict a greater injury "than it will prevent. In such a case the injured "party will be left to his redress at law.* No more "than this is fairly covered by *Huckenstine's* case. "The plaintiff in this case is therefore in the right "court, and if he is substantially hurt by the use "to which the defendants have seen fit to devote "their land, we see no reason why he may not re-"cover, unless it is found in the last of the posi-"tions taken by the defendants, for which *Lippin-"cott's* case is cited.

"It is a fundamental principle of our system of "government that the interest of the public is higher "than that of the individual, so that when these "interests are in conflict the latter must give way. "If the individual is thereby deprived of his prop-"erty without fault on his part, he is entitled to "compensation, but if he is affected only in his "tastes, his personal comfort or pleasure or pref-

"erences, these he must surrender for the comfort
"and preferences of the many. Thus, highways
"are necessary to the public convenience and
"comfort. Some noise and dust are necessarily
"occasioned by the legitimate use of them. This
"may be disagreeable—perhaps, in some cases,
"positively harmful—to some one or more of the
"persons living along them, but for this there is
"no remedy at law or in equity. It is one of the
"necessary consequences of subjecting the indi-
"vidual to the public in those things as to which
"their interests are in conflict."

As noted in the opinion, the principal distinction between the *Sanderson* case and the *Robb* case consists in this: In the *Sanderson* case the Coal Company was using its own land in the only manner practicable to it; that is the only purpose for which it was useful or valuable, to wit, the mining of coal, which could only be carried on by keeping the mines in some manner free from water.

In the *Robb* case, however, the injury, if any, resulted from the manufacture of coke at a particular site. This injury, if any, "is in no sense the natural and necessary consequence of the exercise of the legal right of the owner to develop the resources of his property, but is the consequence of his election to devote his land to the establishment of a particular sort of manufacturing, having no natural connection with the soil or the subjacent strata."

The *Robb* case, therefore, is the same in principle as the *Pine* case, *and we are asking the Court to apply the same principle in that case which was applied by the Supreme Court of Pennsylvania, to wit: the plaintiffs should be left to their remedy in an action for damages and should not be enjoined.*

A similar question came up before the same Court in *Lentz* vs. *Carnegie*, 145 Penn. St., 612, where the rule in the *Robb* case was adhered to and the riparian owner held entitled to damages. The following is from the opinion in the *Lentz* case:

> "We held in *Robb* vs. *Carnegie* (*supra*) that this "mode of estimating damages, which is properly ap- "plicable to cases where an entry is made under the "power of eminent domain, is not ordinarily appli- "cable to actions of trespass. It is not necessary to "repeat the reasons which were given in support of "that conclusion. It is enough to say that we adhere "to them. In case of a taking the natural inquiry "is, how is that which is left affected by the taking? "Where nothing is taken, but an injurious trespass is "alleged, the question is, what will be the cost of re- "storing the thing injured to its former condition? "If the cost of restoration will equal or exceed the "value of the thing injured, then the value becomes "the measure of the plaintiff's damages."

The following are the facts as to *Huckenstein's Appeal* (70 Penn., 102) cited in the *Robb* case:

It was an appeal from a decree restraining the defendant from burning brick on his land. The decree was reversed and the appeal dismissed without prejudice to any rights the plaintiff might have to recover in an action at law. It was held that brickmaking, being a useful and necessary business and necessarily exercised near towns, the burning of bricks, an essential part of the business, is not a nuisance *per se*; that although a useful employment may produce discomfort or injury to those near it, it does not follow that it should be restrained.

The aid of a court of equity is not of right but of grace, to be extended only where its exercise is certainly just, wise and proper. In a question of restraining a lawful business, a court of equity will consider

the custom of the people, the characteristics of their business, the common uses of property and the peculiar circumstances of the place. The following is from the opinion of the Court:

"In regard to the injury to the vines and trees, "which is the chief ground of complaint, the "plaintiff's case is doubtful on two grounds. In "the first place, his testimony as to the injury from "the causes stated is counterpoised, if not out-"weighed, by the testimony of the defendant, both "in the number and skillfulness of the witnesses. "And in the second place, it is rendered more than "doubtful by the testimony of the defense that "the true cause of the blight in the vines is the "nature and cold and wet condition of the soil. "The force of the rebutting evidence that the hill-"side is dry for the reason that water will not lie "on a slope, is broken by the consideration known "to every common observer that water, following "the lines of stratification, will exhude from hill-"sides, oftentimes in large quantities and the "whole year around. To entitle the plaintiff to "an injunction, he must make out a plain case of "injury and damage. 'If the injury be doubtful, "'eventual or contingent, equity will not interfere "'by injunction.' Rhodes *vs.* Dunbar, 7 P. F. "Smith, 287; and a 'Chancellor would consider "'whether he would not do a greater injury by "'enjoining than would result from refusing and "'leaving the party to his redress at the hands of "'court and jury.' Richards appeal, 7 P. F. "Smith, 113, 114."

Hauck vs. *Tidewater Pipe Line Co.*, 153 Penn., 366 (1893).

This case closely resembles the *Robb and Sanderson* cases which we have cited above. This was also an

action in trespass on the case for injuries to land, springs and fishpond. The cause of the injury was oil brought from a distance, allowed to escape from the pipes and to percolate through the land. It was not, in any sense, a natural and necessary development of the land owned by the company. The principle that was applied in the Hauck case is thus stated in the head note:

"Where a corporation is clothed with the right "of eminent domain, and is especially authorized "by law to construct its works and operate them, "any injury resulting from such operation without "negligence and without malice is *damnum absque* "*injuria;* but where a corporation has no right of "eminent domain the operation of its works "causing consequential injuries to another is a "nuisance."

FIFTH POINT.

This is not, however, a case of a dispute between private persons merely, but involves public questions of the highest importance. The City in building this dam and diverting the water acts in its public capacity and as an agency of the State of New York, under authority of its Legislature. Its act is therefore legal and valid.

The erection of this dam and the diversion of this water is a legal and lawful act. They are authorized by chapter 445 of the Laws of 1877 as amended. The title of the act as amended by Laws of 1879, chapter 516, is as follows:

"An Act to provide a further supply of pure "and wholesome water for the city of New York,

"and to provide for perfecting and perpetuating "the right and title of the city of New York to "property, water, water rights and privileges "heretofore taken or used or which may be here- "after taken or used by the said city to increase "the supply of pure and wholesome water for the "use of the said city, and to *provide for the pay- "ment and extinguishment of all claims or damages "growing out of such taking or using.*"

It will thus be seen that the title is in the very broadest terms, and is evidently intended to give to the City of New York all the power that the State of New York can give for such purposes.

This act, with its amendments, is printed in full as an appendix to this brief.

In the first section the City is authorized in the manner prescribed in the act, "to acquire all rights, "titles and interests in and to such real estate by "whomsoever the same may be held, enjoyed or "claimed, and to pay for and extinguish all claims and "damages on account of such rights, titles or interests "growing out of such taking or using."

It will be observed that this statute is sufficient to make the City of New York liable for damages suffered, not only to residents in or citizens of the State of New York but to any other persons.

The scheme of the act provided for the acquisition of rights, extinguishment of claims and the amount of compensation by agreement; or, if that could not be done, by the application to a Court for the appointment of Commissioners and the payment of such compensation as the Court should appoint.

If by reason of the fact that certain persons injured by the exercise of the rights conferred by this statute

are residents of another State and the laws of New York cannot operate directly as an exercise of the right of eminent domain upon them, then this Court, in the exercise of its equitable powers, should aid in carrying out a necessary public work and not allow the same to be defeated by technical difficulties. It is always to be remembered that the State has fully provided for the giving of compensation, hence all the constitutional and legal rights of the complainants have been preserved in the act. It only remains to find a way of doing this—something entirely within the equitable powers and wisdom of this Court.

In this connection we cite the two following cases:

Long Island Water Supply Company vs. *Brooklyn*, 166 U. S., 685 (1896), *affirming Matter of Brooklyn*, 143 N. Y., 596.

The following is from the opinion of the Court:

"All private property is held subject to the "demands of a public use. The constitutional "guarantee of just compensation is not a limita- "tion of the power to take, but only a condition of "its exercise. Whenever public uses require, the "government may appropriate any private prop- "erty on the payment of just compensation. That "the supply of water to a city is a public purpose "cannot be doubted; and hence the condemnation "of a water supply system must be recognized as "within the unquestioned limits of the power of "eminent domain. It matters not to whom the "water supply system belongs, individual or cor- "poration, or what franchises are connected with "it—all may be taken for public uses upon pay- "ment of just compensation."

In *Bauman* vs. *Ross*, 167 U. S., 548–593 (1896), the Court said:

> "By the Constitution of the United States the "estimate of the just compensation for property "taken for the public use under the right of "eminent domain is not required to be made by a "jury, but may be entrusted by Congress to com- "missioners appointed by a court, or by the "executive, or to an inquest consisting of more or "fewer men than an ordinary jury."
>
> See also *United States* vs. *Jones*, 109 U. S., 513.

In the fourteenth section provision is made for compensation for acts done by the City officers previous to the passage of the act.

In the fifteenth section it is provided that as to any damages which may have accrued previous to the taking of proceedings the act shall not be taken to deprive any one of a trial by jury on the question of damages, and the Commissioners shall estimate and determine such damages and compensation only upon the consent of all the parties.

The term "real estate" is defined in the sixteenth section, and is surely broad enough to cover any interests that may be claimed to exist in the present case.

The eighteenth section contains the following:

> "For the purpose of preventing any waste of water "the commissioner of public works of the City of "New York is hereby authorized to construct such "aqueducts, reservoirs, dams, sluices, canals and "appurtenances as may be necessary to collect or "retain the water in or from any lakes or streams "which may be taken under the operation of this "act, and use such waters as the wants and neces- "sities of said city may require, etc."

(Here follow certain provisos that are immaterial in the present case.)

The act also provides for the raising of the money needed to pay the damages by the City of New York through the sale of its bonds (secs. 19 and 20).

Matter of Thompson, 127 N. Y., 463 is a case arising under this Act of 1877.

It appears from the testimony that all the land required in the State of New York has been acquired under this act and paid for, and that many claiming damages in Connecticut have been settled with.

It is thus established that the dam in question has been built and the diversion of water taken place under and by virtue of a statute of the State of New York, authorizing the City of New York to do the acts complained of in this case. This statute permits the exercise of the right of eminent domain in the fullest manner that the law of any State could authorize such action, and provides means by which complete and adequate compensation must be made to any person whose property rights are damaged.

We may add here that there are other somewhat similar statutes under which the City might at the beginning of this action or now exercise rights of eminent domain for securing an adequate water supply. These statutes, though not offered in evidence, are public statutes of the State of New York, of which this Court will take judicial notice, as we understand the law.

Laws of 1883, chap. 490 (The Aqueduct Act).

Laws of 1893, chap. 189 (Sanitary Protection of the Water Supply).

Laws of 1882, chap. 410 (The Consolidation Act).

Laws of 1897, chap. 378 (The Greater New York Charter).

In this connection we refer to the two following cases:

The United States vs. *Great Falls Mfg. Co.*, 112 U. S., 645 (1884).

In this case certain property was taken by the officers or agents of the United States, pursuant to an Act of Congress, as private property for public use, in order to supply the City of Washington with water by means of an aqueduct from the Great Falls of the Potomac.

The following is from the opinion of the Court:

> "We are of the opinion that the United States "having by its agents, proceeding under authority "of an Act of Congress, taken the property of the "claimant for public use, are under the obligation "imposed by the Constitution to make compensa- "tion. The law will imply a promise to make the "required compensation where property to which "the Government asserts no title is taken, pur- "suant to an Act of Congress, as private property "to be applied for public uses, such an implication "being consistent with the constitutional duty of "the Government, as well as with common justice, "the claimants' cause of action is one that arises "out of an implied contract within the meaning of "the statute which confers jurisdiction upon the "Court of Claims of actions founded 'upon any "'contract, express or implied, with the Govern- "'ment of the United States.'"

This case is authority for the proposition that the State having authorized The City of New York to acquire this property and to pay for it, an implied contract has arisen which would be enforcible in the courts, so that the plaintiffs in this case would have an action on implied contract by virtue of the Law of

1877 against The City of New York for any damages they may have suffered by the diversion.

Kaukauna Co. vs. *Green Bay Canal Co.*,
142 U. S., 254.

This was an action for an injunction against maintaining a certain embankment. The injunction was denied and the judgment was affirmed by the Supreme Court.

The case is authority for this proposition in general: where the statute provides a definite and complete remedy for obtaining compensation that remedy is exclusive, but "it is true that if the statutory remedy be incomplete or imperfect, the owner is not thereby debarred from his common-law remedy and may recover his damages in an action of trespass or ejectment."

SIXTH POINT.

The State government has entire control over non-navigable waters within its limits, and hence may change or abrogate the rules of the common law relating to such waters. The control of navigable waters was vested by the Federal Constitution in the general government, leaving the control of non-navigable waters in the original States, hence it follows that the State may pass such laws as to the exercise of the right of eminent domain over such waters as it pleases. This it has done in the present case, as we have seen, by passing condemnation laws authorizing the City to exercise the right of eminent domain on paying compensation. The construction, therefore, of this dam and the diversion of water were duly authorized.

By the Constitution of the United States, the control of navigable waters and to what extent interference therewith shall be allowed is, of course, vested in the Federal Government.

Even as to navigable waters, however, the control over the same by a State within its own boundaries remains in the State, so long as the action that may be taken by the State is not inconsistent with the Federal laws, and until Congress may legislate in relation thereto.

As to non-navigable waters, however, the jurisdiction and control of the same remain in the State Government as to waters within its own territory.

As to such waters, it has absolute and complete control thereof, and any action which the State may take

in reference thereto will not be interfered with by the Federal courts.

That the control of non-navigable waters remained vested in the original State has been taken for granted in all of the decisions.

There are a number of cases, however, which generally relate to obstructions of navigable waters which throw much light upon the subject.

One of the earlier cases was that of *Willson* vs. *The Black Bird Creek Marsh Co.*, 2 Pet., 245, decided by Chief Justice Marshall in 1829.

In that case, the defendants were incorporated under a Delaware statute and empowered to hold and improve certain marsh lands, and were authorized for that purpose to make a dam across the Black Bird Marsh Creek. They did so, and the plaintiffs being the owners of a sloop, brook down the dam and the company sued them in trespass.

The following is from the opinion of Chief Justice Marshall:

> "The Act of Assembly by which the plaintiffs
> "were authorized to construct their dam shows
> "plainly that this is one of those many creeks pass-
> "ing through a deep, level marsh, adjoining the
> "Delaware, up which the tide flows for some dis-
> "tance. The value of the property on its banks
> "must be enhanced by excluding the water from the
> "marsh, and the health of the inhabitants probably
> "improved. Measures calculated to produce these
> "objects, provided they do not come into collision
> "with the powers of the general Government, are
> "undoubtedly within those which are reserved to
> "the States. But the measure authorized by this act
> "stops a navigable creek and must be supposed to

" abridge the rights of those who have been accus-
" tomed to use it. And this abridgement, unless it
" comes in conflict with the Constitution or a law
" of the United States, is an affair between the Gov-
" ernment of Delaware and its citizens, of which this
" Court can take no cognizance. The counsel for the
" plaintiffs in error insists that it comes in conflict
" with the powers of the United States to regulate
" commerce with foreign nations and among the
" several States.

" If Congress had passed any act which bore upon
" the acts in execution of the power to regulate com-
" merce, the object of which was to control State
" legislation over those small navigable creeks into
" which the tide flows, and which abound throughout
" the lower country of the Middle and Southern States,
" we should feel not much difficulty in saying that
" a State law coming in contact with such act
" would be void. But Congress had passed no such
" act. The repugnancy of the law of Delaware to
" the Constitution is placed entirely on its repug-
" nancy to the power to regulate commerce with
" foreign nations and among the several States, a
" power which has not been exercised as to affect
" the question. We do not think that the act em-
" powering the Black Bird Creek Marsh Company
" to place a dam across the creek can, under all
" the circumstances, be considered as repugnant
" to the power to regulate commerce in its dor-
" mant state or as being in conflict with any law
" passed on the subject."

A somewhat similar case came up in *Gilman* vs. *Philadelphia*, 3 Wall., 713 (1865).

In this case the Legislature of Pennsylvania had authorized the City of Philadelphia to build a bridge

across the Schuylkill river, which was wholly within the State of Pennsylvania, and which was to be considered a navigable stream. The plaintiff, Gilman, a citizen of New Hampshire, owning valuable coal wharves just below the bridge, brought this suit for an injunction, claiming that the bridge would be an unlawful obstruction of navigation, and an illegal interference with his rights, and a public nuisance, producing to him special damages, etc.

Mr. Justice Greer dismissed the bill, and his decision was affirmed by the Supreme Court of the United States; Mr. Justice Swayne delivering the opinion of the latter Court.

It is conceded, through the opinon, that there could be no possible doubt of the legality of the bridge unless it could be said to be an obstruction to navigable waters and repugnant to the constitution and laws of the United States, touching the subject of commerce.

The following is from the opinion of Judge Swayne:

"The national Government possesses no powers
"but such as have been delegated to it. The States
"have all but such as they have surrendered. The
"power to authorize the building of bridges is not
"to be found in the Federal Constitution. It has
"not been taken from the states. It must reside
"somewhere. They had it before the Constitution
"was adopted and they have it still. 'When the
"'revolution took place the people of each State
"'became themselves sovereign, and in that char-
"'acter held the absolute right to all their navi-
"'gable waters, and the soil under them, for their
"'own common use, subject only to the rights

" ' since surrendered by the Constitution to the
" ' General Government.' "

(Sub-quotation from Martin *vs.* Waddell, 16 Peters, 410.)

Judge Swayne then quotes from the decision in Pollard's Lessee *vs.* Hagen, 3 How., 230:

Gibbons *vs.* Ogden.
The Wheeling Bridge Case, 18 How., 421.
Willson *vs.* Black Bird Creek Marsh Co., 2 Pet., 250.

—and then stated as to the *Willson* case that there was no difference in principle in that case and the one before the Court, and said:

" Without overruling the authority of that ad-
" judication, we cannot by our judgment annul the
" law of Pennsylvania. * * * The defendants
" are proceeding in no wanton or aggressive spirit.
" The authority upon which they rely was given,
" and afterward deliberately renewed by the State.
" The case stands before us as if the parties were
" the State of Pennsylvania and the United States,
" the river being wholly within her limits. We
" cannot say the State has exceeded the bounds
" of her authority until the dormant power of the
" Constitution is awakened and made effective by
" proper legislation. The reserved power of the
" States is plenary, and its exercise, in
" good faith, cannot be made the subject of re-
" view by this court. It is not denied that the de-
" fendants are justified if the law is valid. We find
" nothing in the record which would warrant us in
" disturbing the decree of the Circuit Court, which
" is therefore affirmed with costs."

We may also cite

Transportation Co. vs. *Chicago*, 99 U. S., 635.

Lake Shore and Michigan R. R. vs. *Ohio*, 165 U. S., 165.

N. Y., N. H. & H. R. R. vs. *New York*, 165 U. S., 628.

U. S. vs. *Rio Grande Dam and Irrigation Co.*, 174 U. S., 690.

See *Covington Bridge Co.* vs. *Kentucky*, 154 U. S., 204.

Kaukauna Water Power Co. vs. *Green Bay Co.*, 142 U. S., 254.

In *Escanaba Company* vs. *Chicago*, 107 U. S., 678, it was held that non-navigable waters are left within the jurisdiction of the State, but navigable waters are under the United States control, "but the States have full power to regulate within their limits matters of internal policy, including in that general designation whatever will promote the best comfort, convenience and prosperity of their people," etc.

Miller vs. *The Mayor, etc., of New York*, 109 U. S., 385 (1883).

This was a bill in equity to abate a nuisance, the alleged nuisance being the East River Bridge between New York and Brooklyn. The complainant was the lessee of certain warehouses upon the banks of the river, and he alleged that the interference of the bridge with navigation would be so great as to destroy his warehouse business, and be a private and irreparable injury to him, for which an action at law would afford no adequate redress.

The complaint was dismissed, and the following is from the opinion of the Supreme Court, written by Mr. Justice Field, affirming the decision below:

"We approve of its (the Court's) action and decree. The erection of the bridge at the elevation proposed was authorized by the action of both the State and Federal Governments. It would, therefore, when completed, be a lawful structure. If, as now completed, it obstructs in any respect the navigation of the river, it does so merely to an extent permitted by the only authorities which could act upon the subject, and the injury then apprehended and alleged by the plaintiff and now sustained is only such as is common to all persons engaged in commerce on the river and doing business on its banks, and, therefore, is not the subject of judicial cognizance. * * * The courts having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable waters within the States or connected with the ocean so as to preserve and protect their free navigation. This power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction is necessarily paramount and conclusive. * * * The bridge, being constructed in accordance with the legislation of both the State and Federal Governments, must be deemed a lawful structure. It cannot, after such legislation, be treated as a public nuisance; and however much it may interfere with the public right of navigation in the East river, and thereby affect the profits or business of private persons, it cannot, on that ground, be the subject of complaint before the courts. The plaintiff is not deprived of his property nor of the enjoyment of it; nor does

" he, from that cause, suffer any damage different in " character from the rest of the public. He alleges " that his business as a warehouse keeper on the banks " of the river above the bridge will be in some degree " lessened by the delay attending the passage " under it of vessels with high masts. The incon- " venience and possible loss of business from this " cause are not different from that which others " on the banks of the river above the bridge may " suffer. Every public improvement whilst ad- " ding to the convenience of the people at large " affects more or less injuriously the interests of " some."

The power of the States to change the Common Law rules as to running waters is illustrated by the law as to APPROPRIATION OF WATERS.

In many of the Western States and Territories the Common Law has been changed and the right to running water exists without private ownership of the soil upon the ground of prior location upon the land or prior appropriation of the water. There has also been legislation upon the subject by Congress. This involves an assertion held legal, that a State can abrogate the Common Law rule and establish a different one.

See—

Gould on Waters, section 228.
Atchison vs. *Peterson*, 20 Wall, 507.
Basey vs. *Gallagher*, 20 Wall, 670.

The following is from the opinion of Judge Field in the *Atchison* case:

" But whether upon a petition or bill asserting that " his prior rights have been thus invaded, a court of " equity will interfere to restrain the acts of the party " complained of, will depend upon the character and " extent of the injury alleged whether it be irremed-

" iable in its nature, whether an action at law would
" afford adequate remedy, whether the parties are able
" to respond for the damages resulting from the
" injury, and other considerations which ordinarily
" govern a court of equity in the exercise of its pre-
" ventive process of injunction."

It would seem that the proceeding by injunction is in rem, *and must be in the jurisdiction where the nuisance exists.*

The following is from a work entitled "A Digest of the International Law of the United States Taken from Documents Issued by Presidents and Secretaries of State, and from Decisions of Federal Courts and Opinions of Attorney Generals," by Francis Wharton. In volume 1, section 20, occurs the following:

The erection of works on the Meduxnikik river in New Brunswick in such a way as to obstruct the flow of water in Maine, and to injure the lumbering by water in that State, is a proper subject for diplomatic interposition by this Government (*Mr. Frelinghuysen, Sec. of State, to Mr. Lowell, May* 16, 1884 (*MSS.*), *Inst. and Great Britain*). A party doing an injury in one State to a water-power running into another State may be proceeded against in civil suit in either State in which he may be served in process, though proceedings *in rem*. by way of injunction or indictment to compel abatement can only be brought in the jurisdiction in which the nuisance exists.

See—

6 Crim. Law Mag., 169.
Stillman vs. *Mfg. Co.*, 3 Woods & M., 538.
Foot vs. *Edwards*, 2 Blatch., 310.
Miss. & Mo. R. R. vs. *Ward*, 2 Black, 485.
Wooster vs. *Manco*, 31 Me., 246.
In re Eldred, 46 Wis., 530.
Thayer vs. *Brooks*, 17 Ohio, 489.
Armendiaz vs. *Stillman*, 54 Tex., 623.

The law of New York is as follows:

An action will not lie for an injury done by the diversion of a watercourse where the premises injured are in another State. Such actions as they relate to injuries to realty are *local* actions.

Watts Administrators vs. *Kinney*, 23 Wend., 484.
S. c. *on Writ of Error*, 6 Hill, 82.
De Courcy vs. *Stewart*, 20 Hun, 561.
American Union Tel. Co. vs. *Middleton*, 80 N. Y., 408.

SEVENTH POINT.

Having shown that a State has the right to change the rule of the common law, and that it has done so in this case by authorizing the City to exercise the right of eminent domain and making it liable for damages, we now cite certain cases more closely in point and showing that an injunction should not issue.

The learned counsel for the complainants, in their argument below, concededly were unable to cite a case where an injunction had issued in a case just like the present one, and we have been unable to find such a case.

An important decision on which alone, we think, the decree appealed from should be reversed is the following:

United States vs. *Rio Grande Dam Irrigation Co.*, 174 U. S., 690 (1899).

This was a bill in equity to restrain the defendant from constructing a dam across the Rio Grande river, in the Territory of New Mexico, and appropriating the waters of that stream for the purpose of irrigation.

The following is from the opinion of the Court:

"The unquestioned rule of the common law was "that every riparian owner was entitled to the con- "tinued natural flow of the stream. It is enough, "without other citations or quotations, to quote the "language of Chancellor Kent, 3 Kent Com., and "section 439, 'Every proprietor of lands on the "'banks of a river has naturally an equal right to "'the use of the water which flows in the stream "'adjacent to his lands as it was wont to run "'(*currere solebat*), without diminution or altera- "'tion. No proprietor has a right to use the water "'to the prejudice of other proprietors above or "'below him, unless he has a prior right to divert "'it or a title to some exclusive enjoyment. He "'has no property in the water itself, but a simple "'usufruct while it passes along. *Aqua currit et* "'*debet currere ut currere solebat* is the language of "'the law. Though he may use the water while it "'runs over his land, as an incident to the land, he "'cannot unreasonably detain it, or give it another "'direction, and he must return it to its ordinary "'channel when he leaves the estate.' While this "is undoubted, and the rule obtains in those States "in the Union which have simply adopted the com- "mon law, *it is also true that as to every stream* "*within its dominion a State may change this common* "*law rule and permit the appropriation of the flow-* "*ing waters for such purposes as it deems wise.* "Whether this power to change the common law rule "and permit any specific and separate appropria- "tion of the waters of a stream belongs also to the "Legislature of the Territory, we do not deem it

" necessary for the purposes of this case to inquire.
" We concede, *arguendo*, that it does.

"Although this power of changing the common
" law rule as to streams within its dominion un-
" doubtedly belongs to each State, yet limitations
" must be recognized: First, that in the absence of
" specific authority from Congress, a State cannot,
" by its legislation, destroy the right of the United
" States as the owner of lands bordering on the
" stream to the continued flow of its waters, so
" far, at least, as may be necessary for the bene-
" ficial uses of the Government property; second,
" that it is limited by the superior power of the
" general Government to secure the uninter-
" rupted navigability of all navigable streams
" within the limits of the United States. In
" other words, the jurisdiction of the general
" Government over interstate commerce and its
" natural highways, vests in that Government the
" right to take all needed measures to preserve the
" navigability of the navigable water-courses of
" the country, even against any State action.

"It is true, there have been frequent decisions
" recognizing the power of the State, in the absence
" of Congressional legislation, to assume control of
" even navigable water within its limits, to the
" extent of creating dams, booms, bridges and
" other matters which operate as obstructions to
" navigability. The power of the State to thus
" legislate for the interest of its own citizens is
" conceded, and until, in some way, Congress
" asserts its superior power and the necessity of
" preserving the general interests of the people of
" all the States, it is assumed that said action,
" although involving temporarily an obstruction to
" the free navigability of a stream, is not subject

" to challenge. A long list of cases to this effect " can be found in the reports of this Court."

Here follow citations.

This late and important case of the highest court in the land sustains our contention in the present case. So far as it relates to navigable waters and the jurisdiction of the United States over the same, it, of course, has no application here.

It is, however, ample authority for the proposition that a State may change the common law rule as to running water and permit the appropriation of the same for such purposes as it deems wise, and that when it has done so such action is not subject to challenge.

In the present case the State of New York, by the acts of its Legislature, referred to elsewhere in this brief, has authorized the City of New York to take and appropriate the waters of the Byram river, within its own boundaries, for the purpose of supplying its citizens with pure and wholesome water. The State has also provided in the said acts an ample and complete method of compensating anyone who may be injured by the diversion of water. It has, therefore, been guilty of no illegal act, and hence no injunction should issue.

A similar principle was adopted in the following case, to wit:

Osborne vs. *Missouri Pacific Railway Co.*,
147 U. S., 248 (1892).

This was a bill in equity against the railroad company by the owner of a building on the public street in St. Louis, upon which the company was about, under competent municipal authority, to lay down tracks for use in running cars drawn by steam power. The bill was for an injunction. It was held that the complainant

had an adequate remedy at law for the injuries complained of, and was not entitled to the injunction.

The following is from the opinion of the Court:

"Equitable jurisdiction may be invoked in view "of the inadequacy of the legal remedy where the "injury is destructive or of a continuous character "or irreparable in its nature; and the appropria- "tion of private property to public use, under color "of law, but in fact without authority, is such an "invasion of private rights as may be assumed to "be essentially irremediable, if, indeed, relief may "not be awarded *ex debito justitiae*.

"But where there is no direct taking of the estate "itself, in whole or in part, and the injury com- "plained of is the infliction of damage in respect "to the complete enjoyment thereof, a court of "equity must be satisfied that the threatened "damage is substantial and the remedy at law in "fact inadequate before restraint will be laid down "upon the progress of a public work. And if the "case made discloses only a legal right to recover "damages rather than to demand compensation, "the court will decline to interfere.

"In McElroy *vs.* Kansas City, 21 Fed. Rep., 257, "which was an application for an injunction to re- "strain the grading of a street in front of the com- "plainant's lot, Mr. Justice Brewer, then Circuit "Judge, considered under what circumstances a "chancellor could grant such relief. It was ruled "that, if the injury which the complainant would "sustain from the act sought to be enjoined could "be fully and easily compensated at law, while, "on the other hand, the defendant would suffer "great damage, and especially if the public would "suffer large inconvenience, if the contemplated

"act were restrained, the injunction should be "refused, and the complainant remitted to his "action for damages."

Union Steamboat Co. vs. *The City of Chicago*, 39 Fed. Rep., 723, and certain other cases may also be cited, to wit:

Where the action of a city in executing a public work is within the scope of its authority, and free from fraud and corruption, it will not be enjoined, though the methods adopted result in special damage to a complainant. This is an opinion by Chief Justice Fuller, and is decided, apparently, mainly on the authority of the *Escanaba Co.* vs. *Chicago; Willson* vs. *The Marsh Co., and Gilman* vs. *Philadelphia*, all of which have already been cited.

New Haven Water Co. vs. *Wallingford*, 72 Conn., 293 (October, 1899).

This was an action brought to restrain the Borough of Wallingford from diverting the waters of the Pine river. The plaintiff was a private corporation engaged in supplying the City of New Haven with water, and the defendant was a municipal corporation. The following is from the opinion:

"The plaintiff next claims that as a riparian "owner, it is entitled to the full flow of the river, "and to an injunction to restrain the defendant "from diverting the water, at least until it pays "damages for such diversion. It is conceded that "the defendant has not paid damages for diversion "of the water from the plaintiff's property, and "that it is liable in damages for such diversion. "But the real question in this case does not relate "to the right of the plaintiff as riparian owner "to damages, nor to the amount of such damage, "nor even to its right under certain circumstances

" to an injunction restraining the diversion until " damages have been paid, but it relates to the " very different question whether the Court erred " in refusing to grant an injunction upon the facts " found. The answer to this question is to be " looked for in the several facts found. The plain- " tiff bought its property in 1897, with full knowl- " edge of what the borough had done prior to that " time in this matter, and with full knowledge of " all the other appurtenant facts put upon the " record. The water diverted is necessary for the " uses of the borough, and to enjoin the defendant " from diverting it might cause great hardship. " This stream is practically the only source of ad- " ditional supply open to the borough. It is " found that it is doubtful whether the damage to " riparian owners below the pumping station will " be more than nominal; the borough has tried to " settle for them, and is ready and willing, and " abundantly able to pay them as soon as the " amount is ascertained. Upon the facts found " upon this part of the case, the injunction was " properly refused."

Harding vs. *Stamford Water Co.*, 41 Conn., 87.

A woolen mill was established on a water-course which it used in part for power and in part for wool, the supply in dry season being sufficient only for the latter. Afterwards a corporation, under a charter from the Legislature, purchased a tract of land four miles above on the stream, and at that point diverted a portion of the water to the Borough of Stamford for the domestic use of the inhabitants, and for manufacturing and other purposes. The charter contained a provision that the corporation should be liable to no damage for taking the water. The owners of the mill brought a petition for an injunction, pending which the

corporation procured an amendment to its charter providing for compensation for property taken. The diversion of the water was no damage to the petitioners, except during the dry season.

(1) Held that the diversion was one which the respondents as riparian proprietors had no right to make.

(2) That the provision of the charter giving them the power to take the water without making compensation was unconstitutional and void.

(3) That in view of the amendment of their charter providing for compensation, the Court in its discretion would allow the respondents time to make compensation, and if not made that a perpetual injunction should be granted.

Higgins vs. *Flemington Water Co.*, 36 N. J. Eq., 538 (1883).

(1) A diversion of a water-course by the authority of a riparian proprietor to enable a company to supply, in part, a village with water is a legal wrong to another riparian owner, who thereby sustains a perceptible and substantial damage.

(2) As between co-proprietors, such a diversion is not a reasonable use of the common property.

(3) After entertaining a bill for such a wrong, and settling on final hearing the legal right of the complainant, a Court of Equity will not send him to law for redress, but will enjoin the defendant from making such diversion.

The following late cases may also be referred to:

Sparks Manufacturing Co. vs. *Town of Newton*, 45 Atl. Rep. 596 (Court of Errors and Appeals of New Jersey, March 5, 1900).

(1) When a riparian proprietor seeks the aid of a Court of Equity to restrain the diversion of water of a municipal corporation for public purposes, and offers to forego his right to an injunction on recovering just compensation which he asks the Court to determine, and the defendant in its answer consents to pay such compensation, so to be determined by the Court, in case the Court considers the complainant entitled to an injunction, the Court has jurisdiction to ascertain the amount of such compensation.

A municipality which buys a piece of land on a private stream several miles distant from its corporate limits does not thereby become entitled as riparian owner to draw from the stream a supply of water for the inhabitants of the town.

The Town of Newton has no authority to divert water from private streams to the detriment of lower riparian owners, on condition that it will store storm water and give it out into the streams in dry times and thus confer a compensatory benefit on these owners, they not consenting thereto.

The circumstances of these cases are fully stated in the opinion of Vice-Chancellor Pitney, in 57 N. J. Eq., 367; 41 Atl., 385.

Platt vs. *The City of Waterbury*, 45 Atl. Rep., 154 (Conn., Jan. 4, 1900).

This was a suit to restrain the defendant from polluting with sewerage the Naugatuck river, for damages and injunction, etc. It was held that the discharge of sewerage into the river was an unreasonable use of the stream and could not be acquired by proscription. Merely granting a city authority by its charter to construct sewers to carry off the refuse of its inhabitants to a river does not make such use of the sewers a governmental act freeing the city from personal liability

for injuries resulting therefrom, as from the lawful exercise of a governmental power.

Pollution of a river by city sewers so as to destroy the value of property located thereon is a taking of private property for a public use within the meaning of the constitutional requirement that just compensation shall be paid therefor, and, no matter what the necessity therefor, the city cannot avoid its liability to render just compensation therefor.

It was held that where the sewage of a city polluted a stream so as to destroy the value of plaintiff's manufacturing plant located thereon, the plaintiffs were entitled to maintain an injunction against the city to compel it to provide other means for disposing of its sewage within ample time, or to compensate plaintiffs for injuries sustained to their property. The following is from the opinion of the Court:

> "The appropriation of the river to carry such
> "substances to the property of another is an in-
> "vasion of his right of property. When done for
> "a private purpose it is an unjustifiable wrong.
> "When done for a public purpose it may become
> "justifiable, but only upon payment of compensa-
> "tion for the property thus taken. Public neces-
> "sity may justify the taking, but cannot justify
> "the taking without compensation."

Watson vs. *Town of New Milford*, 45 Atl. Rep., 167 (Conn., January 19, 1900).

This was also a case of pollution of a stream by sewage (see opinion of Baldwin, *J.*)

Grey, Attorney-General vs. *Mayor, etc., of Paterson*, 45 Atl. Rep., 995 (Court of Errors and Appeals of New Jersey, March 5, 1900).

Held, that the City of Paterson had legislative authority to construct its system of sewers, discharging their contents into the Passaic river, and is not therefore subject to the charge of maintaining a public nuisance. Also held, that by reason of the great injury which would fall upon the City by restaining the continuous use of its sewerage system, and the acquiescence of these riparian owners above where the tide flows, their injury being comparatively small, it would be inequitable to grant them an injunction.

Held, that they might obtain redress by amending their bill, or by filing a new bill praying for an injunction unless the City of Paterson will consent to make such compensation to them as shall be ascertained to be just, or, they may, if they elect, sue at law for their damages.

Mayor, etc., of Newark vs. *Sayre*, 45 Atl. Rep., 985 (Court of Errors and Appeals of New Jersey, April 2, 1900).

Held, that the Legislature of the State of New Jersey has constitutional power to confer on municipalities the right to use the tidal streams within its borders as outlets for public sewers, and that the City of Newark had the right to use the Passaic river for such purposes.

Although such use pollutes the water and air in the neighborhood of a dock on the river owned by private persons, and lessens its value, that fact would not justify an injunction to restrain the City from constructing and operating a sewer which the municipal authorities have within the limits of their local jurisdiction determined to be necessary for sewerage purposes.

Rockport Water Co. vs. *Inhabitants of Rockport*, 161 Mass., 279.

Under a statute authorizing a town to take by purchase or otherwise the franchise or corporate property

of a water company "on payment to said corporation of the actual cost of its franchise, works," etc., a payment is not a condition precedent to the taking, and the water company cannot maintain a bill in equity to enjoin the town after the taking and before payment from preventing the laying of water-pipes by the company.

EIGHTH POINT.

As to certain decisions where water rights in adjacent States were affected.

We believe it is substantially conceded by the learned counsel for the complainants that no case can be found where an injunction has issued in a situation substantially the same as the present one. At the risk of making this brief unduly lengthy, but with the hope of assisting the Court, we print statements of the substance of all the important cases which seem to us to have a bearing upon this point.

In Massachusetts the difficulty seems to have been solved by allowing the person in the adjacent State injured by the diversion of waters in Massachusetts to sue in tort in the courts of Massachusetts.

It seems to be tacitly assumed that an injunction would not lie.

Bannigan vs. *City of Worcester*, 30 Fed. Rep., 392 (1887).

In this case the complainants were citizens of Rhode Island and owners of mill property on the banks of the Blackstone river, in that State.

The defendant, under a Massachusetts statute, had taken its water supply from the Tatnuck brook, a tributary of the Blackstone river, in Massachusetts.

The plaintiffs, pursuant to the said statute, filed their petitions in the Massachusetts Court, praying for the appointment of Commissioners and the amount of damages.

The plaintiff then removed the case into the United States Circuit Court for the District of Massachusetts. This case and several somewhat similar ones were before the Court on motions to remand and on demurrers to the petitions.

The following is from the opinion:

"I am of opinion, however, that it is the duty "of this Court to entertain the suit and to ascer- "tain and enforce the rights of the plaintiffs by "the proceeding which the State Law prescribed, "whether it be by the usual process of law actions "or by a special process prescribed for the occa- "sion. The defendant argues that the appoint- "ment of Commissioners properly belongs to the "State Court, and that a controversy removal to "the Federal Court does not arise in these cases, "unless there should be an appeal to a jury after "the award of the Commissioners comes in. But "I see no reason why this Court cannot adminis- "ter relief by the appointment of Commissioners, "as well as by trying the question of damages with "a jury. * * *

"On the demurrer the defendant alleges that "the petitions show no case for relief under the "statute. The argument is that since the lands of "the petitioners are in Rhode Island, and their "rights in the water of Tatnuck Brook are appur- "tenant to those lands, the petitioners cannot "claim a remedy under this statute unless it

" be held to have extra-territorial effect, which, " of course, is inadmissible. I cannot agree with " this argument. It has been held by the Su- " preme Court of Massachusetts that the owner of " land in an adjoining State may have, as appurtenant " to such land, an interest in land or water in Mass- " achusetts, which may be protected by suit in the " courts of that State (*Manville Co.* vs. *City of* " *Worcester*, 138 Mass., 89). I am strongly inclined " to the opinion that the decision in that case is of " binding force on this Court in the case at bar; and, " even if it be not so, I am inclined to follow that " case as being of high authority, and well sup- " ported by the reasoning of the opinion."

Manville Co. vs. *City of Worcester*, 138 Mass., 89.

This was an action of tort, for diverting the waters of a natural stream in Massachusetts, and preventing the same from coming to the plaintiff's mill in the adjoining State of Rhode Island.

It was held that such an action could be maintained in the State courts of Massachusetts.

The following is from the opinion:

" The defendant's counsel contended, in the first " place, that such rights as the plaintiff claims " cannot extend beyond the Rhode Island line, and " went the length of maintaining that a servitude " cannot be created in one State in favor of lands " in another. We are unable to agree to this prop- " osition upon either principle or authority. " Every decision and dictum that we have found, " bearing on the precise point, is the other way " citing cases) * * *.

" We think that the cases which recognize civil, " and even criminal liability for flowing land in one

"State by means of a dam in another, are hardly "less pertinent (citing cases). The defendant ad- "mits these cases to be law and tries to distinguish "them. But we cannot assent to the distinction "between discharging and withdrawing water. "The consequence in one case is positive, in the "other negative; but in each case it is the con- "sequence of an act done outside the juris- "diction where the harm occurs, and the con- "sequence is as direct in the latter case as "in the former. The right infringed in "the former case is called absolute owner- "ship, in the latter, easement; but the laws "of Rhode Island, which make a man owner of a "tract of land there, have no more power to dimin- "ish freedom of action in Massachusetts than any "other of its laws. A concurrence of the laws of "both States is as necessary in that case as in the "one at bar, to create a liability which can be en- "forced in either State consistently with principle. "Such a concurrence presents no technical diffi- "culties, and, if the substantive end to be attained "is a proper one it will be recognized and acted on "here, as we have no doubt it would be in Rhode "Island if the position of the parties were re- "versed.

"Of course, the laws of Rhode Island cannot "subject Massachusetts land to a servitude, and, "apart from any constitutional considerations, if "there are any, which we do not mean to intimate, "Massachusetts might prohibit the creation of such "servitude so it might authorize any acts to be done "within its limits, however injurious to lands or "persons outside them. But it does not do either. "It has no more objection to a citizen of Rhode "Island owning an easement as incident to his "ownership of land in that State than it has to

" his owning it in gross, or to his purchasing lands
" here in fee. Questions might be conceived as to
" the transfer of such easements, but they do not
" arise here (Slack *vs.* Walcott, *ubi supra*). So far
" as their creation is concerned, the law of Massa-
" chussetts governs, whether the mode of creation
" be by deed or prescription, or whether the right
" be one which is regarded as naturally arising out
" of the relation between the two estates; being
" created, the law of Rhode Island, by permission
" of that of Massachusetts, lays hold of them and
" attaches them in such way as it seems fit to land
" there, Massachusetts being secured against any-
" thing contrary to its views of policy by the com-
" mon traditions of the two States and by the
" power over its own territory which it holds in
" reserve."

Brickett vs. *Haverhill Aqueduct Co.*, 142 Mass., 394 (1886).

This was an action in tort for obstructing and diverting a water-course. The act of the defendant was done under authority of the statute of Massachusetts, authorizing an aqueduct corporation to take and use waters of certain ponds to supply the inhabitants of a town with water under certain conditions.

The plaintiff owned lands situated partly in Massachusetts and partly in New Hampshire through which the stream flowed. He contended that the effect of taking the water and building the dam was to diminish the flow of water through his land, and has brought this common-law action of tort for diversion of the water or the stream.

It was held that so far as the acts done are within the authority of the statute, the damages must be ascertained in the manner provided by statute; but where the proceeding under the statute violates the provisions thereof

and causes damage to the land-owner, the latter may maintain an action of tort, and it is immaterial that the lands so injured is situated in another State.

The following is from the opinion:

> "We do not deem it important that the land of "the plaintiff which was injured was outside of "the limits of this State. The language of the "act is general and puts all water rights upon the "same footing and applies to the proprietor out- "side the State. Such proprietor certainly has "no greater rights than the citizen whose lands or "water rights within the State are injured by the "acts of the defendant under authority of the "Legislature. Whether the constitutional objection "we have considered would be open to a citizen of "another State whose lands or water rights in that "State are injured we need not discuss or decide."

The following were cases cited below by the learned counsel for the complainant as sustaining his contention.

It will be evident from the summary of these cases, which we have tried to make entirely fair, that none of them pass upon the vital points of this case.

> *The Holyoke Water Power Co.* vs. *The Connecticut River Co.*, 22 Blatch., 131 (1884); S. C. 20 Fed. Rep.; also reported but not in full, 52 Conn., 570.

This was a decision by Mr. Justice Shipman, sitting as Judge of the Circuit Court of the United States for the Second Circuit.

The defendant was a Connecticut corporation incorporated "for the purpose of improving the boat navigation of Connecticut river," a navigable stream, and to remove certain obstructions from the channels and bars of said river, to construct dams for the purpose of

entering the locks, but in such a way as not to prevent the convenient passage of boats, lumber and fish.

Under this charter the defendant built a dam in the State of Connecticut at Enfield Falls on the Connecticut river.

The plaintiff was incorporated under the laws of Massachusetts for the purpose of upholding and maintaining a dam across the Connecticut river above the defendant's dam and in the State of Massachusetts.

The plaintiffs claimed that the raising of the dam by the defendant would set back the water upon the plaintiff's works and diminish the effective head of its fall, and hence brought this bill for an injunction. A decree was granted against a further raising of the dam and against the constructing of a new dam to a greater height than the height occupied by the present structure.

The following is from the opinion of Judge Shipman :

" The defendant insists that, inasmuch as the " State of Connecticut authorized the addition to " the dam for the purpose of improving the navi- " gation of Connecticut river within the limits " of the State, any consequential injury not " amounting to the taking of land, which is occa- " sioned in the exercise of ordinary care by reason " of such improvement, to the land of a riparian " proprietor, is *damnum absque injuria;* and it may " be considered as settled that, where a State, by " itself or by its agents, in the construction of " works authorized or directed by the Legislature " of such State, for the benefit of the navigation of " a navigable river within its borders, causes, with- " out malice and in the exercise of ordinary care, " a necessary consequential injury to land within " its borders, no relief will be granted against such

" injury. The State and Federal courts concur in " the assertion of this principle. The Supreme " Court of Errors of Connecticut says, in regard to " works erected for the improvement of the navi- " gation of Connecticut river: 'The public, being " ' the owners of this river, have an unques- " ' tionable right to improve the navigation of " ' it without any liability for remote and con- " ' sequential damage to individuals' (Hollister *vs.* " Union Co., 9 Conn., 436). 'Acts done in the " ' proper exercise of governmental powers, and " ' not directly encroaching upon private prop- " ' erty, though their consequences may impair its " ' use, are universally held not to be a taking, " ' within the meaning of the constitutional pro- " ' vision. They do not entitle the owner of such " ' property to compensation from the State or its " ' agents or give him any right of action. This is " ' supported by an immense weight of author- " ' ity * * *. We have examined the decisions " ' of the Court of Illinois, and others to which we " ' have been referred by the plaintiffs-in-error, " ' but in none of them was it decided that a " ' riparian owner on a navigable stream, or that " ' an adjoiner on a public highway, can maintain " ' a suit at common law against public agents to " ' recover consequential damages resulting from " ' obstructing a stream or highway in pursuance " ' of legislative authority, unless that authority " ' has been transcended, or unless there was a " ' wanton injury inflicted, or carelessness, negli- " ' gence, or want of skill in causing the obstruc- " ' tion' (Transportation Company *vs.* Chicago, 99 " U. S., 635).

" In this case the injury will be caused to prop- " erty beyond the limits of Connecticut, and the " question arises whether the doctrine which

" has been asserted is applicable to this state " of facts. This question has never, so far as I " can ascertain, been decided by the courts of " this country. The question has arisen whether, " by virtue of the right of eminent domain, " one State can take, or subject to public use, " land in another State, and the decisions have " naturally been against such a power (Farnum " *vs.* Canal Co., 1 Sumn., 46; Salisbury Mills *vs.* " Forsaith, 57 N. H., 124; Wooster *vs.* Great " Falls Co., 39 Me., 246; United States *vs.* Ames, " 1 W. & M., 76). In two cases which have re- " cently arisen in Federal courts, and which " involved the right of a State to regulate or to " improve the navigation of a river wholly within " its limits, the judges have carefully limited their " decisions to the facts in the cases (Escanaba Co. " *vs.* Chicago, (107 U. S., 678; Huse *vs.* Glover, 15 " Fed. Rep., 296). Important suggestions which " bear upon the questions in this case are made " by Judge Treat in Rutz *vs.* St. Louis (7 Fed. " Rep., 438), and by Mr. Justice McLean, in Pal- " mer *vs.* Commrs. of Cuyahoga Co. (3 McLean, 226).

" The rule which has been referred to is based " upon the principle that the improvement of " the navigation of navigable rivers within a " State, is a part of the State's governmental " duties, and that the work which is done towards " such improvement is done in the discharge of " the governmental powers of the State, and " that the land of the riparian proprietor within " the State is subject to the just exercise of " this power, and that when the State undertakes " to exercise its governmental power the public " good is paramount to the consequential injury to " land which is incidentally and necessarily affected " by the improvement. The land is under the

"jurisdiction of the State, and the State derives "the power to inflict remote and consequential in- "juries upon it by virtue of such jurisdiction. "The owner of land abutting upon a navigable "river owns it subject to the right of the State to "improve the navigation of the river, because the "land is within the governmental control of the "State, but it seems to me that the State obtains "by virtue of its governmental powers no control "over or right to injure land without its jurisdic- "tion. Jurisdiction confers the power and the right "to inflict consequential injury, but where no juris- "diction exists the right ceases to exist. It is a "recognized principle that the statutes of one State "in regard to real estate, cannot act extra-territo- "rially. As Connecticut has no direct jurisdiction "or control over real estate situate in another "State, it cannot indirectly, by virtue of its at- "tempted improvement of its own navigable "waters, control or subject to injury foreign real "estate. If this resolution is a bar to an action "for any consequential injury to land or to rights "connected with land, in Massachusetts, Connecti- "cut is acting extra-territorially."

It is to be observed of this case that it is entirely between private persons. No private rights are involved, nor was it proposed to give compensation to the plaintiff, nor, in fact, were there any means provided for doing so, and it might also be added that the stream was a navigable one.

The claim was that the injury could be inflicted without liability for damages.

The case is thus radically different from the one now before the Court.

Rutz and others vs. *City of St. Louis*, 7 Fed. Rep., 438. (1881).

This was an action at law for the recovery of damages in the Circuit Court for the Eastern District of Missouri. Damages were said to have been caused to the plaintiff's land in the State of Illinois, opposite the City of St. Louis, bordering on the Mississippi river, because of a dyke built on the Missouri shore unlawfully, which dyke caused the plaintiff's land to be washed away.

One of the points raised was that the action was a *local* one and hence not in the proper court.

The following is from the opinion of Judge Treat:

"And hence, if the common law rule as to *local* "actions must prevail, the plaintiff is remediless, "practically, however great the wrong sustained, "because no legal service could be there had.

"It seems that the old rule as to *local* actions "should not be considered applicable to suits of "this nature. Where there is a wrong, there must "be a remedy. The injury in this case was caused "by defendant acting within another jurisdiction.

"*Second*—Defendant contends that the dyke "built by it was under authority of Missouri "statutes, and consequently was not unlawful, "despite the averments in plaintiff's petition to the "contrary.

"Can such a proposition be raised by demurrer "to the petition? If the United States courts are "bound to take notice of public acts of every State, "and the State of Missouri, by statute authorized "the dyke to be erected, then it was a lawful "structure, intra-territorially, if properly erected, "and does not fall within the rules concerning "nuisances (Citing cases)."

The rest of the opinion is unimportant in this connection, dealing with the question as affected by the navigability of the Mississippi river.

Farnum vs. *Blackstone Canal Corporation*, 1 Sumner, 146 (1830) (United States Circuit Court of Rhode Island, before Judges Storey and Pitman).

This was an action to compel the proprietors of the canal to reduce the height of a dam across the Blackstone river, which had been raised by them whereby the operations of the plaintiff's mill were impeded, and for a perpetual injunction.

In the head note of this case there is the following *quære*:

> "If the Legislature of that State can authorize "a dam locally in that State to be raised so as to "flow back a public river running into another "State to the injury of mill privileges, locally "situate in the latter State?"

In this case the questions arose between two corporations created by adjacent States, with the same name, and authorized to construct a canal in each of the States respectively. The main question in this case was whether the acts of incorporation authorized the act which was complained of.

Here, also, it would seem to have been contended that there was no liability for damages and no means of compelling judgment thereof.

> *U. S.* vs. *Ames*, 1 Woodbury & Min., 76 (1845).

This was an action in the Circuit Court of the United States for the First Circuit, and was in trespass on the case for flowing land of the United States situated in Springfield over which jurisdiction had been ceded to

them by the State of Massachusetts. The question simply was whether the laws of Massachusetts applied as to flowage to lands that had been ceded to the United States Government. The case is of no application to the present one.

Stillman vs. *White Rock Manufacturing Co.*, 3 Woodbury & Min., 538. (In the Circuit Court of the United States, for the First Circuit, at Boston (1847):)

This was an action for an injunction against the diversion of water. The owner was a citizen of Connecticut, and the defendant a corporation in Rhode Island. The plaintiffs owned an undivided half of certain land in Connecticut, and a mill dam over the Pawtucket river, and one-half the water-power thereof, the said river being the dividing line between Rhode Island and Connecticut. The defendants owned the eastern half of another dam 250 rods above this one, and the eastern half of this one, both being situated in the State of Rhode Island. They also owned one-half the power of the river. The defendant company made a canal from the upper dam of the easterly side of the river and diverted a portion of the water above it around the lower dam and running then into the river below. This was used to the injury of the complainant, and hence they prayed for an injunction.

The following is from the opinion of the court:

> "If both sides of the river were situate in the "same State, under the same laws, or were within "the jurisdiction of the same courts, then to dis- "criminate as to the powers, extent and legality "of the injury for which the action was brought "would often be of little importance.
>
> "But here, unfortunately, different States and "different laws, in some respects, upon the two "sides and different circuits of this Court possess

" jurisdiction on each side no less than different " State Courts.

" It seems necessary, therefore, to ascertain now " what is the interest, if any, which the complain- " ants, by owning land on the Connecticut side of " the river, are entitled to in the water on the " Rhode Island side; and, indeed, this becomes " almost the whole gist of the controversy.

" After careful inquiry this interest seems to me " to be such a corporeal easement or right as has " just been described, to an individual half of the " water on that side, as well as on the other side. A " fence or embankment cannot be usually made in the " middle of a large stream where the right to the soil " terminates; and if made, it would not correspond " with the true interests each owner on the banks has " to some extent in all the flowing water between " these banks. Hence, it is reasonable to regard these " interests in the whole stream to be an undivided " half, or tenancy in common, and if either side uses " or takes out more than half, or at a place above " removes and diverts large quantities from coming " at all to the dam, where the complainants are in- " terested, their proportionate interests in the whole " stream are injured, and an action of some " kind or other must lie for redress somewhere. " * * * * True, different forms of actions " may lie as redress is sought for different views of " the injury, and these different actions may be " brought properly in one State or the other, as they " relate more immediately to the acts done as affect- " ing the land and mills complainants own in Con- " necticut, or as affecting the undivided share in the " water on the Rhode Island side which the com- " plainants also own. The canal here being on the " Rhode Island side and first injuring the rights of " the complainants there to an undivided one-half of

" the stream would seem to justify an appropriate
" remedy there for that particular wrong.

" The injury, thus far, and in this view, may be
" regarded as committed on interests possessed in the
" water beyond the centre of the stream, and not
" injury on and to the mill situated upon one of the
" banks, or to merely that half of the stream which
" is contiguous. Such interests may exist in water
" and its use. 2 N. Hampr., 259.

" The first and direct injury, then, is to the ease-
" ment and consequent rights existing beyond the
" centre. The next consequential injury would be to
" the mills and land adjoining the stream before
" reaching the centre on the Connecticut side, and a
" proper remedy for that would lie there. Thus, a
" right of way on land in one State to a farm in
" another is an interest situated in the first State and
" an obstruction may be there prosecuted. * * *
" The chief error in the position of the respondents
" is in supposing that the plaintiffs have no rights
" whatever beyond the centre of the river or no in-
" terests to be protected there. If this be the correct
" view which I have adopted, then no question arises
" as to jurisdiction over the subject of this bill by
" this Court any more than as to the code of laws
" that must control our decision. It must be the
" code beyond the centre when the action is brought
" for a violation of the complainant's right exist-
" ing beyond the centre, and which is here the
" code of Rhode Island, and jurisdiction must
" be and properly is here for an injury done
" there, and hence the prosecution must be for
" that in the courts of Rhode Island, or if pursued
" in the tribunal of the general government, it
" must be not in the second circuit of Connecticut,
" but in the first circuit held in the district of
" Rhode Island. Nothing can more fully illustrate

"the propriety of this view in the present in-
"stance than some of the incidents to the peculiar
"remedy by injunction which is sought here. A
"party is entitled to that remedy in case of great
"and irreparable injuries inflicted on him if
"done without right. Yet, here this remedy
"must be sought in Rhode Island or it would
"be of no use. The canal is situated there
"which is made to divert the water. The owners
"of the canal, the supposed wrongdoers, reside
"there, and an injunction issued in another
"State or circuit, could not be executed
"there, it being a proceeding *quasi in rem*. The
"injured party, then, must be deprived entirely of
"this legal summary and useful species of redress
"unless rights and jurisdiction to protect them
"exist beyond the centre of the stream. * * *
"But the first act done in the present case was
"done in Rhode Island, and is proceeded against
"as a private nuisance erected in Rhode Island.
"The remedy by injunction is a specific one, or
"*quasi in rem*, and whether that nuisance be in
"fact situated in Rhode Island or Connecticut,
"it must be enjoined against, wherever it is,
"and there alone, and by the laws existing
"there alone it must be abated, if at all. Sup-
"pose it is proceeded against criminally, it
"surely may be in Rhode Island, where it is
"erected and where it is the injury. Why not,
"then, if prosecuted in a civil form? * * * It
"is no answer to all this that some injury is done
"by this canal to property and rights on the Con-
"necticut side, and for which a real action could
"not be brought, except in Connecticut, and could
"not be decided except in conformity to the laws
"of Connecticut. The complainants in this case
"have not chosen to resort to such an action any-
"where, much less in this State, and, on the con-

" trary, have prayed for an injunction against the
" diversion of the water on the Rhode Island side,
" and by an unwarranted canal used there to re-
" move large quantities of it entirely from the dam
" occupied in part by the complainants, and it is
" manifest that this remedy for this evil must be
" prosecuted in Rhode Island alone, where the
" nuisance is situated, and where it is to be re-
" strained or nowhere. * * * * These points
" settled, the whole case is settled."

Note—The judge would seem to hold also that the Rhode Island statute of twenty years as to prescription prevailed, and not the Connecticut statute of fifteen years; or, in other words, that the Rhode Island law was to govern and not the Connecticut law.

Note—It will be observed that no question of public use was raised in this case, nor of eminent domain, nor of right under special State statutes, nor of compensation, the case being determined apparently upon the common law principle relating to flowing waters.

Foot vs. *Edwards*, 3 Blatchford, 310 (1855).

This was an action for damages for an injury to mill property of the plaintiffs situated in Massachusetts by the diversion of a stream of water upon which the mill stood. The act causing the diverson was committed in Connecticut. It was held that the Circuit Court of the United States for Connecticut had jurisdiction of an action by the mill-owner against the person who diverted the water in Connecticut, for damages caused by said diversion.

It would seem, from the clear and satisfactory argument of the judge, that a suit of this nature might be brought either in the jurisdiction where the wrongful

act was done or in the jurisdiction where the land injured was situated.

Crosby vs. *Hanover*, 36 N. H., 404.

This case holds that the laws of New Hampshire as to laying out highways cannot go to the extent of condemning a pier and abutment of a bridge across the Connecticut river in Vermont.

Salisbury Mills vs. *Forsaith*, 57 N. H., 124 (1876).

A Massachusetts corporation having erected a dam in Massachusetts on its own land, whereby the water of a stream was set back upon the land of a riparian owner above in the State of New Hampshire, cannot by petition have the damage of such land only assessed, and have their rights of flowage ascertained and fixed under the New Hampshire act for the encouragement of manufacturers.

"It is certain that this act can have no extra "territorial application or effect. The use and "management of Massachusetts real estate cannot "be subjected to the control of New Hampshire "laws. The Legislature of this State can no "more confer upon a Massachusetts corporation "the right to build a dam and water mill "upon their own land or the land of another with its "consent in that State than it can forbid such act "there, and so far as I can see they might as well be "either or both as to impose terms, conditions and "regulations upon the building of such dam and "mill as provided by the act. * * * It is one of "the plainest elementary rules that no Legisla-"ture can extend its laws to territory beyond the "borders of its own State. Now, then, can the "courts of this State have any jurisdiction over "lands and mills in another State? How shall a

" court in New Hampshire decree that a corpora-
" tion in Massachusetts may not maintain a dam
" in that State above a certain height, and if such
" decree were made, how would the court be able
" to enforce it?"

The case of Wooster *vs.* Great Falls Mfg. Co., 39 Me., 246, was regarded as in point.

See also Wooster *vs.* Winnipissogee Lake Co., 25 N. H., 525.

In the latter case it was held that the action should be brought where the land injured lies.

Wooster vs. *Great Falls Mfg. Co.*, 39 Me., 246.

This was an action in trespass on the case to recover damages for flowage of land. By a Maine statute it was provided that any man may erect and maintain a water mill and a dam to raise water for working it upon and across any stream that is not navigable, upon the conditions therein named, and when such dam is lawfully erected the person sustaining damages in his lands by being overflowed may obtain compensation by complaint, and that no action shall be sustained at common law for recovery of damages for such overflowing of land, except in the manner provided to enforce the payment of damages after they have been ascertained by complaint.

To entitle the owners of a dam and mill to the benefits of this statute, the mill as well as the dam must be situated within the limits of this State.

And where the owner of land is damaged by its overflow, by means of a dam erected to operate a mill situated in another state across a river, the boundary of the two states, he may maintain an action for his indemnity at common law.

NINTH POINT.

As to what action this Court should take.

Three courses are open to this Court to remedy the obvious injustice that would result to the public and private interests of New York if the decree appealed from should remain in force:

(1) This Court might reverse the decree and dismiss the bill without prejudice to any action the complainants might see fit to take in an action at law for damages or in procedure under the Act of 1877 (see *Raton Water Works* vs. *Raton*, 174 U. S., 360).

(2) It might remand the case to the Circuit Court to take evidence of what restrictions and conditions could be placed on the use of the dam and water, so that no substantial injury could result to the complainants (see suggestions quoted on page 35 of this brief from the opinion in *Strobel* vs. *Kerr Salt Co.*, 164 N. Y., 303);

(3) It might adopt the course followed by the New York Court of Appeals in the elevated railroad cases. That is, the Court could refer the matter to a Master to take testimony as to the amount of damages, and, after the same have been ascertained, only grant an injunction if the defendants neglect to pay the same within a reasonable time. The Court might also, if the practice will allow, refer the question of damages to a jury.

The course followed in the New York State courts is shown in the cases about to be cited, and furnishes what, in our judgment, is the best solution of the difficulty.

Papenheim vs. *Metropolitan Elevated Railroad*, 128 N. Y., 436 (1891).

This action was brought to perpetually enjoin the elevated railroad companies from occupying their railway in front of the plaintiff's premises, and to procure the structure already built there to be removed, and to recover from the defendants the loss and damage sustained by reason of the past operating of the railroad. It was found that the defendants were authorized by certain acts of the Legislature to exercise the right of eminent domain and thus to acquire plaintiff's easements, if necessary, and that the defendants had like authority to build the railway, but there was nothing in the acts giving the defendants any authority to take the plaintiff's property without compensation. Judgment was rendered for the plaintiff, and it was provided that *the injunction should not issue in case the defendants paid the amount of the damage to the fee upon the execution by the plaintiff of a deed conveying to them the plaintiff's interest in the easement taken by the defendants.*

The following is a summary of what was held by the Court of Appeals, so far as the same may be applicable to the present case:

It was held that the elevated railroad structure was as to the plaintiff an illegal structure and inconsistent with the use of the avenue as a public street. That at the time of building the railroad the defendants committed a trespass upon the property, which trespass had been continued from the time when the road was built up to the time of the judgment; that by continuing the trespass the defendants laid themselves open to continuous actions, in which the recovery would be for the damage sustained up to the time of the commencement of each action.

> "In an action at law the owner of the property
> "interfered with or trespassed upon cannot recover
> "damages to his premises based upon the assump-
> "tion that such trespass is to be permanent. He

" can recover only the damages which he has sus-
" tained up to the commencement of the action.
" The judgment entered for the damages sustained
" does not operate as a purchase of the right to
" continue the trespass. But the owner may re-
" sort to equity for the purpose of enjoining the
" continuance of the trespass, and to thus prevent
" a multiplicity of actions at law to recover dam-
" ages; and in such an action the Court may de-
" termine the amount of damage which the owner
" would sustain if the trespass were permanently
" continued, and it may provide that, upon pay-
" ment of that sum, the plaintiff shall give a deed
" or convey the right to the defendant, and
" it will refuse an injunction when the de-
" fendant is willing to pay upon the receipt of a
" conveyance. The Court does not adjudge that the
" defendant shall pay such sum and that the plaintiff
" shall so convey. It provides that, if the convey-
" ance is made and the money paid, no injunction
" shall issue. If defendant refuses to pay the in-
" junction issues. It may be that, in the case of a
" railroad actually running its cars upon or through
" property of another, it would not be justified in
" refusing to pay upon the delivery of the convey-
" ance, and, instead thereof, submitting to an injunc-
" tion. Public interests might have a right to be
" heard in that respect. But it is enough to say that,
" in the case where permanent damage is to be paid,
" there is a condition that a conveyance shall be
" made, and the defendant thus secures title to the
" property used. In cases where the owner wishes
" to actually stop the further trespass, and where the
" defendant has no legal right to acquire the prop-
" erty, such condition would not be inserted, and an
" injunction would issue upon the right of the
" owner being determined (Henderson *vs.* Central
" Railroad Co., 78 N. Y., 423).

"The plaintiff, if he receive the amount of the "permanent damage, is by the Court compelled to "convey the interest to the defendant, which the "defendant pays for in that way. Condemnation "proceedings are thus avoided. It is conclusively "determined that the trespass is to be continuous, "and defendant concedes it when it avails itself of "the condition and pays the permanent damage in "order to receive the conveyance. It is only in "this way that the owner recovers as for a per-"manent damage to his property.

"In a case where the defendant has no power to "condemn the property, if the owner in that event "proceeds in equity he recovers only his damage "up to the entry of the judgment, and at the same "time secures an injunction which prevents the "future trespass. If the owner sue at law he "recovers his damages, as stated,"

Other elevated railroad cases that may be cited are:

Hughes vs. *Metropolitan Elevated R. R. Co.* 130 N. Y., 28.

Thompson vs. *Metropolitan Elevated R. R. Co.*, 130 N. Y., 363.

Mitchel vs. *Metropolitan Elevated R. R. Co.*, 134 N. Y., 14.

See also—

Story vs. *N. Y. Elevated R. R. Co.*, 90 N. Y., 123.

Lahr vs. *N. Y. Elevated R. R. Co.*, 104 N. Y., 268.

Pond vs. *Metropolitan Elevated Railroad Co*, 112 N. Y., 186.

Kernochan vs. *Metropolitan Elevated Railroad Co.*, 161 N. Y., 344.

Other cases, not against the elevated railroad companies, involving similar principles may be referred to:

Amerman vs. *Dean*, 132 N. Y., 355.
Stowers vs. *Gilbert*, 156 N. Y., 604.
Uline vs. *N. Y. C. & H. R. R. Co.*, 101 N. Y., 98.
Henderson vs. *N. Y. C. R. Co.*, 78 N. Y., 423.

Amerman vs. *Dean*, 132 N. Y., 355, related to certain covenants in conveyances which ran with the land, restricting its use in certain respects. This action was for a permanent injunction and for damages. It was held that while a court of equity has power to enforce the performance of these covenants, the exercise of this authority is within its discretion, and where there has been such a change in the character of the neighborhood as to defeat the objects and purposes of the covenants and to render it inequitable to deprive a grantee of the privileges of conforming his property to that character, such relief will not be granted, and in lieu thereof damages may be allowed.

The trial Court refused a permanent injunction, but awarded damages and an injunction until the damages should be paid, and this judgment was affirmed by the Court of Appeals.

The elevated railroad cases were distinguished on the theory that they were unlawful structures, amounting to a nuisance; that being a nuisance, the defendant was under a legal obligation to remove it, and the law would not presume that he would not do so; for that reason damages could only be recovered up to the time of the commencement of the action. In the present case, however, the building was not unlawful or a nuisance, and there was, consequently, no presumption that it would be abated or discontinued.

"This action is in equity, and one of the objects "sought is to avoid a multiplicity of actions which "might be brought in case only past damages could "be recovered.

"*We see no reason why permanent damages may not* "*be awarded. This right is recognized by the recent* "*cases.*"

The Court then refers to the *Pappenheim* case, and quotes therefrom.

Stowers vs. *Gilbert*, 156 N. Y., 600.

This was an action to restrain the defendant from erecting a wall alleged to encroach upon the plaintiff's land, and to recover damages for the alleged trespass.

The following is quoted from the opinion:

"The rule of damages is settled in this State as "trespasses on land.

"In a case where the defendant has the power to "condemn the property he has entered upon (illus- "trated in the elevated railway cases), the plaintiff "proceeds in equity for injunction or for his per- "manent damages. The plaintiff, if he receives the "amount of the permanent damages, is by the Court "compelled to convey the interest to the defendant, "which the latter pays for in that way, and condem- "nation proceedings are thus avoided.

"It is conclusively determined that the trespass "is to be continuous, and the defendant concedes it "when he avails himself of the condition and pays "the permanent damage in order to receive the con- "veyance. It is only in this way that the plaintiff "recovers as for a permanent damage to his property "(Pappenheim *vs.* M. E. R. Co., 128 N. Y., 436, 444,

" 445; New York National Exchange Bank *vs.* M.
" E. R. Co., 108 N. Y., 660).

" In a case like the one above, where the defend-
" ant has no power to condemn the property he
" has entered upon, two remedies are open to the
" plaintiff—an action at law for damages, and a
" suit in equity for an injunction and damages.

" In the action at law only such temporary dam-
" ages as are recoverable as have been sustained
" up to the time of the commencement of the
" action, and the plaintiff may bring successive
" actions until the defendant abates the nuisance
" (Uline *vs.* N. Y. C. & H. R. R. R. Co., 101 N. Y., 98;
" Pappenheim *vs.* M. E. R. Co., 128 N. Y., 436;
" Pond *vs.* M. E. R. Co., 112 N. Y., 186; Plate *vs.*
" N. Y. C. R. R. Co., 37 N. Y., 472; Mahon *vs.* N.
" Y. C. R. R. Co., 24 N. Y., 658).

" In the suit in equity, which is the remedy in-
" voked in this case, the plaintiff recovers only his
" damages up to the entry of the judgment, and at
" the same time secures an injunction which pre-
" vents the future trespass (Pappenheim *vs.* M. E.
" R. Co., 128 N. Y., 436, 445).

" The wall erected by defendant upon plaintiff's
" land is a nuisance and the defendant is under
" legal obligation to remove it, and it is not to be
" presumed he will seek to continue it permanently
" in violation of the injunction of the court, there-
" by subjecting himself to damages in contempt
" proceedings, or ejectment.

" Damages in the present action are not to be
" awarded upon the assumption of permanent in-
" jury, as the judgment does not and cannot
" operate as a purchase of the right to have the
" wall remain as at present constructed.

"The rule of damages in cases of private tres-
"pass and nuisance has been so exhaustively
"examined in the able opinion of Judge Earle in
"Uline *vs.* N. Y. C. & H. R. R. R. Co. (101 N. Y.,
"98), that it is quite unnecessary to review the
"authorities in detail."

TENTH POINT.

It follows from these considerations that the decree of the Court below allowing a perpetual injunction was erroneous and should be reversed upon such terms and conditions and with such instructions as to this Court may seem proper.

Dated New York, December 1, 1901.

JOHN WHALEN,
Corporation Counsel.

GEORGE L. STERLING,
Of Counsel.

PART IV.

THIS CONSISTS OF THE STATUTES OF THE STATE OF NEW YORK AUTHORIZING THE CITY OF NEW YORK TO EXERCISE THE RIGHT OF EMINENT DOMAIN APPLICABLE TO THE PRESENT CASE, AND IS ALSO CALLED APPENDIX I.

POOR COPY

APPENDIX I.

Laws of 1877, Chapter 445.

An Act to provide for perfecting and perpetuating the right and title of the city of New York to property, water, water rights and privileges heretofore taken or used, or which may be hereafter taken or used, by said city, to increase the supply of pure and wholesome water for the use of said city, and to provide for the payment and extinguishment of all claims or damages growing out of such taking or using.

Passed June 15, 1877, three-fifths being present.

[The title of this act was amended by chapter 516 of the Laws of 1879 so as to make it read as follows :]

An Act to provide a further supply of pure and wholesame water for the city of New York, and to provide for perfecting and perpetuating the right and title of the city of New York to property, water, water rights and privileges, heretofore taken or used, or which may be hereafter taken or used, by said city to increase the supply of pure and wholesome water for the use of said city, and to provide for the payment and extinguishment of all claims or damages growing out of such taking or using.

The People of the State of New York, represented in Senate and Assembly, do enact as follows :

Acquisition of land for obtaining water supply by Commissioners of Public Works.

Section 1. In all cases where the commissioner of public works of the city of New York shall have heretofore entered upon, taken or used, or shall hereafter enter upon, take or use, or shall deem it necessary to enter upon, take or use the waters of any lake, or any

upland, or land under water, or water rights or privileges, or any incorporeal hereditaments, or any other property, for the purpose of maintaining, preserving or increasing the supply of pure and wholesome water for the use of said city, the said commissioner is authorized, for and in behalf, and in the name of the mayor, aldermen and commonalty of the city of New York, in the manner hereinafter prescribed, to acquire all rights, titles and interests in and to such real estate, by whomsoever the same may be held, enjoyed or claimed, and to pay for and extinguish all claims or damages on account of such rights, titles or interests, or growing out of such taking or using.

Sec. 2. The said commissioner, his engineers, surveyors and such other persons as may be necessary to enable him to perform his duties under this act are hereby authorized to enter upon any land or water for the purpose of making surveys or examinations, and to agree with the owners, occupants or claimants of any real estate which may have been required or damaged, or which hereafter may be required or damaged, in carrying into effect the provisions of this act, as to the amount of compensation to be paid to such owners, occupants or claimants, and the time and manner of such payment. And in any case such real estate shall be owned, occupied or enjoyed by the people of this state, or by any county, town or school district within this state; such rights, titles, interests or properties may be paid for upon agreement respectively with the commissioners of the land office, who shall act for the people of this state, with a chairman and a majority in numbers of the board of supervisors of any county who shall act for such county and with the supervisor and commissioners of highways in any town who shall act for such town, and with the trustees of any school district that shall act for such district.

Proceedings in case parties cannot agree.

Sec. 3. In case the said commissioner of public works is unable to agree with the said owner or owners, occupant or occupants, claimant or claimants of any such real estate, or with any or either of such officers as to the sum or sums to be paid for the acquisition or extinguishment of any such real estate, or of any right, title or interest thereto or therein, for carrying into effect the purposes of this act, the said commissioner of public works shall have the right to acquire such real estate, or to extinguish any such right, title or interest thereto or therein, for the mayor, aldermen and commonalty of the city of New York in the manner and by the special proceedings hereinafter provided.

Petition for appointment of Commissioners.

Sec. 4. For the purpose of acquiring such real estate or of extinguishing any right, title, interest thereto or therein, and the said commissioner of public works, for and in behalf of the said mayor, aldermen and commonalty of the city of New York may present a petition praying for the appointment of commissioners of appraisal to the supreme court, at any general or special term thereof, held in the district in which the real estate described in the petition may be situated, such petition shall be signed and verified according to the practice of such court. It must contain a general description of the real estate which the said commissioner seeks to acquire, and of the rights, titles and interests therein which he seeks to extinguish, and also a general statement of the names and places of residence of the parties, as far as the same can by reasonable diligence be ascertained, who own, occupy or enjoy, or who claim to own, occupy and enjoy, any such real estate, or any right, title or interest therein, and if any of such persons are infants, their ages, as near as may be, must be stated; and if any such persons are idiots, or persons of unsound mind, or are unknown, that fact must be stated, together with such other allegations

and statements of liens or incumbrances upon such rights, titles and interests as the said commissioner may see fit to make. A copy of such petition, with a notice of the time and place the same will be presented to the Supreme Court, must be served on all persons whose interests are to be affected by the proceedings at least ten days prior to the presentation of the same to the said Court.

1. If the person on whom such service is to be made resides in this state and is not an infant, idiot, or person of unsound mind, service of a copy of such petition and notice must be made on him, or his agent or attorney, authorized to contract for the sale or surrender of the real estate described in the petition, personally, or by leaving the same at the usual place of residence of the person on whom such service must be made as aforesaid with some person of suitable age.

2. If the person on whom such service is to be made resides out of the State, and has an agent residing in this State, authorized to contract for the sale or surrender of the property described in the petition, such service may be made on such agent, or on such person, personally, out of the State, or it may be made by publishing the notice, stating briefly the object of the application and giving a description of the property to be taken or effected, in the state paper, and in a paper printed in the county in which the real estate taken or effected is situated, once in each week for one month next previous to the presentation of the petition; and if the residence of such persons residing out of this state, but in any of the United States, or any of the British colonies in North America, is known, or can by reasonable diligence be ascertained, the said commissioner must, in addition to such publication as aforesaid, deposit a copy of the petition and notice in the post-office, properly folded and directed to such person at the post-office nearest the place of res-

idence at least two weeks before presenting such petition to the court, and pay the postage chargeable thereon in the United States.

Minor. 3. If any person on whom such service is to be made is under the age of twenty-one years, and resides in this state, such service shall be made as aforesaid on his general guardian, or if he has no such guardian, then on such infant, personally, if he is over the age of fourteen years, and if under that age, then on the person who has the care of such infant, or with whom such infant resides.

Idiots. 4. If the person on whom such service is to be made is an idiot, or of unsound mind, and resides in this State, such service may be made on the committee of his person or estate, or if he has no such committee, then on the person who has the care or charge of such idiot or person of unsound mind.

Unknown owners. 5. If the person on whom such service is to be made is unknown, or his residence is unknown and cannot by reasonable diligence be ascertained, then such service may be made under the direction of the court by publishing a notice, stating the time and place the petition will be presented, the object thereof, with a general description of the property to be affected by the proceedings, in the state paper, and in a paper printed in the county where the property is situated, once in each week for two weeks previous to the presentation of such petition.

Infants without guardians. 6. In case any party to be affected by the proceedings is an infant, idiot or person of unsound mind, and has no general guardian or committee, the court shall appoint a special guardian or committee to attend to the interests of such person in the proceedings; but if a general guardian or committee has been appointed for such person in this state, it shall be the duty of such general guardian or committee to attend to the interests

of such infant, idiot or person of unsound mind, and all notices required to be served in the progress of the proceedings, may be served on such general or special guardian or committee.

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7. In case the people of this state, or any county of this state, or any town in this state, or any common school district within this state, or any corporation organized under the laws of this state, shall own, occupy or enjoy any real estate which is to be acquired or affected in carrying into effect the purposes of this act such notice and petition may be served in the manner hereinbefore prescribed, upon the following officers respectively: upon the clerk to the commissioners of the land office, in behalf of the people of the state; upon the clerk of the board of supervisors of any county, in behalf of such county; and upon the supervisor of any town, and the commissioners of highways in any town, in behalf of such town; upon the trustees of any school district, in behalf of such district; and upon the acting chief executive officer of any corporation, in behalf of such corporation.

8. In all cases not herein otherwise provided for, service of orders, notices and other papers in the special proceedings authorized by this act, may be made as the supreme court shall direct.

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9. Whenever there shall be one or more of the estates enumerated in article one of title two of chapter one of the second part of the Revised Statutes, entitled "Of the creation and division of estates," in any real estate, as the term real estate is defined in this act, required by the city of New York for the purpose of this act, such estate and real estate may be acquired by said city by means of the special proceedings authorized by this act.

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In every such case the commissioner of public works, in addition to the statements now required by the said

act shall set forth and state in his petition the facts, so far as the same can with reasonable diligence be ascertained, in relation to any such estate, and the person, persons, or class of persons then in being or not in being, who are or may become entitled in any contingency to any estate as aforesaid in such real estate, and may pray that such estate may be acquired and such persons may be bound by the said proceedings; and thereupon the court to whom such petition is presented, if there be no attorney appearing in their behalf, shall appoint some competent and disinterested attorney or officer of the court to appear in such proceedings and represent the rights, interests and estate of the person, persons, or class of persons aforesaid in such real estate, and to protect the same on the appraisal and proceedings aforesaid; and it shall be the duty of the court, on or after the confirmation of the report of appraisal, to ascertain by such report or by a reference for that purpose or otherwise, in its discretion, the rights, interest and estate of such person, persons or class of persons, in the real estate so appraised and in the compensation awarded therefor, and to make an order determining the amount of share of such compensation to which such person, persons or class of persons are or may become entitled on account of such estate, as the same shall arise or become vested in them respectively, and to direct and to provide for the payment, investment or securing thereof, for the benefit of the person, persons or class of persons aforesaid, who are or who may, in the contingency upon which such estate arises, become entitled thereto; upon the payment or deposit by the comptroller of the city of New York of the sums to be paid for the acquisition of such real estate in the manner provided in section eight of this act, and in the manner directed by order of Court the said commissioner of public works, for and in behalf of the said the mayor, aldermen and commonalty of the city of New York, shall be entitled to enter upon, take

possession of and use the said real estate for the purposes indicated in this act, and such person, persons or class of persons as are or may become entitled to such estate shall be barred of and from all right or claim in and to such land adverse to its use and occupation by the said commissioner or by the said the mayor, aldermen and commonalty.

apply to proceedings not completed.

Sec. 2. This act shall take effect immediately, and the provisions hereof shall apply to all special proceedings heretofore brought, under chapter four hundred and forty-five of the laws of eighteen hundred and seventy-seven, and the various acts amendatory thereof, and which shall not be completed at the date of the passage of this act.]

The part (*subd.* 9), *within brackets, added by chapter* 582 *of the Laws of* 1881.

Appointment of commissioners.

Sec. 5. On presenting such petition to the supreme court as aforesaid, with proof of service of a copy thereof and notice as aforesaid, all or any of the parties whose estates or interests are to be affected by the proceedings may show cause against granting the prayer of the petition, and may disprove any of the facts alleged in it. The court shall hear the proofs and allegations of the parties, and, if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders who reside in the county (or some adjoining county) where the property to be appraised is situated, commissioners to ascertain and appraise the compensation to be made to the parties interested in the real estate proposed to be taken or affected or theretofore taken or affected in such county for the purposes indicated in this act, and to fix the time and place for the first meeting of the commissioners.

Sec. 6. The said commissioners shall take and subscribe the oath prescribed by the twelfth article of the constitution. Any one of them may issue subpœnas and administer oaths to witnesses, and any such witness sworn and examined and testifying falsely shall be deemed guilty of perjury, and shall be liable to the pains and penalties imposed by law for that offense. Such subpœnas may be served within this State by any person and must be served by any sheriff or constable when thereunto required; in case of the failure or refusal of any witness so subpœnaed to obey such subpœna, or to answer any question or to produce any books or papers when thereunto required by a majority of the said commissioners, the commissioners, or a majority of them, shall report such failure or refusal to a justice of the supreme court in the said judicial district, in which such commissioners were appointed, before whom the same proceeding shall thereupon be had, as though such failure or refusal were that of a witness duly subpœnaed to appear and testify upon the trial of an action before such justice, and such justice shall in all respects proceed as though such subpœna had issued out of the court in which he presides; a majority of such commissioners may adjourn the proceedings before them, from time to time in their discretion. Whenever they meet, except by appointment of the court, or pursuant to adjournment, they shall cause reasonable notice to be given to the parties interested, or their agent or attorney. They shall view the property described in the petition, and hear the proofs and allegations of the parties, and reduce the testimony taken by them, if any, to writing, and after the testimony in each case is closed, they, or a majority of them, all having an opportunity to be present, shall, without any unnecessary delay, and before proceeding to the examination of any other claim, ascertain and determine the compensation which ought justly to be made by the said mayor, aldermen and commonalty of the city of

Powers and duties of commissioners.

New York, to the owners or the persons interested in the rights, titles and privileges to be acquired or affected by the said proceeding. They, or a majority of them shall also determine what sum ought to be paid to the general or special guardian or committee of an infant, idiot, or person of unsound mind, or to an attorney appointed by the court to attend to the interests of any unknown owner or party in interest, not personally served with notice of the proceedings and who has not appeared, for costs, expenses and counsel fees. They, or a majority of them, shall also (but not in excess of any request therefor made in behalf of the city) determine the height to which the waters of any lake or natural stream, concerning which such proceedings are instituted, may be raised, and the point to which such waters may be drawn down by the said, the mayor, aldermen and commonalty of the city of New York, such determination to be made before any award of damage shall be made on account of such proposed raising or depressing of such waters The said commissioners shall make a report of their proceedings to the supreme court, with the minutes of the testimony taken by them, if any; and they shall be entitled to the payments hereinafter provided for their services and expenses, to be paid from the fund hereinafter provided.

Sec. 7. On such report being made by said commissioners, the counsel to the corporation of the city of New York shall give notice to the parties, or their attorneys, to be effected * by the proceedings, according to the rules and practice of said court at a general or special term thereof for the confirmation of such report, and the court shall thereupon confirm such report, and shall make an order containing a recital of the substance of the proceedings in the matter of the appraisal and a general description of the real estate appraised,

* So in the original.

for which compensation is to be made; and shall also direct to whom the money is to be paid, or in what bank and in what manner it shall be deposited by the comptroller of the city of New York.

Sec. 8. A certified copy of the order so to be made as aforesaid shall be recorded, at full length, in the office of the clerk of the county in which the real estate described in it is situated, and thereupon, and on the payment or deposit by the comptroller of the city of New York of the sums to be paid as compensation for the acquisition of such real estate, or for the extinguishment of any right, title or interest therein, and for the costs, expenses and counsel fees as directed by said order, the said commissioner of public works, for and in behalf of the said mayor, aldermen and commonalty, shall be entitled to enter upon, take possession and use the said real estate for the purposes indicated in this act and all parties mentioned in this act who shall have been made parties to the proceedings, together with all parties claiming or to claim, by, through or under them, shall be forever divested and barred of all right, estate and interest in such real estate, and of all claim for any damage on account of the taking, using or affecting of such real estate, or of any right, title, interest therein. All real estate acquired by the said mayor, aldermen or commonalty of the city of New York, under and pursuant to the provisions of this act, shall be deemed to be acquired for public use. Within twenty days after the confirmation of the report of the commissioners, as provided for in the seventh section of this act, either party may appeal, by notice, in writing, to the other, to the supreme court from the appraisal and report of the commissioners. Such appeal shall be heard by the supreme court at any general or special term thereof on due notice thereof being given according to the rules and practice of said court. On the hearing of

To be recorded.

Appeal.

such appeal, the court may direct a new appraisal and determination of any question passed upon before the same or new commissioners in its discretion, but from any determination of the general term, either party, if aggrieved, may take an appeal, which shall be heard and determined by the court of appeals. In case of a new appraisal, the second report shall be final and conclusive on all the parties interested. If the amount of compensation to be made by the said city is increased by the second report, the difference shall be a lien on the real estate appraised and shall be paid by the comptroller of the city of New York to the parties entitled to the same, or shall be deposited in bank as the court may direct, and if the amount is diminished, the difference shall be refunded to the said the mayor, aldermen and commonalty of the city of New York by the party to whom the same may have been paid, and judgment therefor may be rendered by the court, on the filing of the second report, against the party liable to pay the same. Such appeal shall not affect the possession by the city of New York of the real estate appraised; and when the same is made by others than the said city it shall not be heard except on the stipulation of the party appealing not to disturb such possession.

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Sec. 9. If there are adverse and conflicting claimants to the money, or any part of it to be paid as compensation for the real estate taken or affected, the court may direct the money to be paid into the said court by the said comptroller, and may determine who is entitled to the same and direct to whom the same shall be paid, and may, in its discretion, order a reference to ascertain the facts on which such determination and order are to be made.

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Sec. 10. The court shall appoint some competent person to appear for and protect the rights of any party in interest who is unknown, or whose residence is unknown, and who has not appeared in the proceeding by an attorney or agent. The court shall also have

power, at any time, to amend any defect or informality in any of the special proceedings authorized by this act as may be necessary, or to cause new parties to be added and to direct such further notices to be given to any party in interest as it deems proper, and also to appoint other commissioners in place of any who shall die or refuse or neglect to serve or be incapable of serving.

Proceedings in case of defective titles.

Sec. 11. If, at any time, after an attempt to acquire title by appraisal of damages or otherwise, it shall be found that the title thereby attempted to be acquired is defected, the said city may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made, and at any stage of such new proceedings the court may authorize the said city, if in possession, to continue in possession, and if not in possession, to take possession and use such real estate during the pendency and until the final conclusion of such new proceedings, and may stay all actions and proceedings against the said city on account thereof on the comptroller of said city paying into court such sum as the court may direct, to pay the compensation therefore when finally ascertained, and in every such case, the party intrusted in such real estate may conduct the proceedings to a conclusion if the said city delays or omits to prosecute the same. And if, at any time, the said city shall require, for the purpose indicated in this act, to acquire any additional real estate, or to extinguish any other or further rights, titles, interested therein in addition to that which it has already acquired or extinguished, such city may acquire such additional real estate or extinguish such additional rights, titles, interests therein, or any such real estate, or any right, title or interest therein, which it now uses or occupies, or which it has heretofore used or occupied, by purchasing the same of the persons or parties owning the same, or interested therein, or

Additional real estate, acquisition of.

affected by such proceedings, and by paying to such parties such damage as they may sustain by reason thereof if the amount of such compensation or damages can be agreed upon between such commissioner of public works and such persons or parties; and if such commissioner of public works shall, for any cause, be unable to agree for the purchase of such real estate, or shall be unable to agree upon the sum which shall be paid to such persons or parties in satisfaction of the damages they may sustain, or if the title to any such real estate or rights already acquired or extinguished, or attempted to be acquired or extinguished, shall, for any cause, prove defective or imperfect, then and in every such case such commissioner of public works may proceed to acquire and perfect title to such real estate or rights, and to ascertain and appraise such damages in the manner and by the proceedings hereinbefore in this act prescribed.

Sec. 12. The commissioners of the land office shall have power to grant to the said city any real estate belonging to the people of this state which may be required for the purposes indicated in this act, on such terms as may be agreed on between them and the said commissioner of public works, always, however, reserving and maintaining the rights of the people and riparian owners to go to the water at any point to which the same may be drawn; and if any real estate of any county, town or school district is required by such city for the purposes of this act, the majority of the board of supervisors acting for such county, or the supervisor of any such town, with the commissioners of highways therein acting for such town, or the trustees of any school district acting for such district, may grant or surrender such real estate for such compensation as may be agreed upon between such officers, respectively, and the said commissioner of public works.

Sec. 13. In case any real estate required by said city for the purposes of this act shall be vested in any trustee not authorized to sell, release and convey the

same, or in any infant, idiot or person of unsound mind, the supreme court shall have power by a summary proceeding, on petition to authorize and empower such trustee or general guardian or committee of such infant, idiot or person of unsound mind, to sell, convey or surrender the same to the said city on such terms as may be just; and in case any such infant, idiot or person of unsound mind has no general guardian or committee, the court may appoint a special guardian or committee for the purpose of making such sale, surrender or conveyance, and may require such security from such general or special guardian or committee as said court may deem proper. But before any conveyance or release authorized by this section shall be executed, the terms on which the same is to be executed shall be reported to the court on oath, and if the court is satisfied that such terms are just to the party interested in such rights, titles, interests or property, the court shall confirm the report and direct the proper conveyance or release to be executed, which shall have the same effect as if executed by an owner of such rights, titles, interests or property having legal power to sell, surrender and convey the same.

Lands already taken, proceedings for acquiring title to, etc.

Sec. 14. In all cases where the commissioner of public works shall have heretofore entered upon, taken or used, any real estate, either with or without the license of the owner thereof, for the purpose of increasing the supply of water for the city of New York, and the title to such real estate shall not have been acquired by said city either by purchase or by any proceedings under any existing law and the said city, by any of its officers, agents or employees, shall be in possession thereof at the time this act shall take effect, and such possession shall be continued for the period of sixty days thereafter, such possession shall be deemed an election on the part of said city to take such real estate under and pursuant to the provisions

of this act, and in that case it shall be the duty of the corporation counsel, at the expiration of said sixty days, to make the necessary application for the appointment of commissioners pursuant to the provisions of this act to appraise the damages and compensation to be paid for the taking and using of the same. The performance of such duty may be enforced by the supreme court by mandamus on the application of any owner or claimant of the real estate so taken or used, and upon the hearing before the commissioners appointed upon such application they shall, if requested by said owners or claimants, also appraise and determine the amount of damages sustained by said owners or claimants respectively by reason of any use or occupation of the said real estate by said city, or any of its officers or agents, before the taking of such application. The said commissioners shall in their report state the amount of damages so ascertained and determined by them, and the amount thereof shall form a part of the amount required to be paid by said city before the right and title to the real estate specified in said report shall be vested in said city as hereinbefore provided. Upon such hearing all of the provisions of this act in relation to compelling the attendance of witnesses, and the examination thereof, shall apply to the claim for damages growing out of such use and occupation.

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Sec. 15 As to any damages which may have accrued to the owner or claimant of any real estate, as to which the proceedings provided by this act may be instituted, before such proceedings shall have been instituted, this act shall not be taken or construed to deprive any party of a right to a trial by jury of the question of such damage, and the said commissioners shall estimate and determine such damages, and the compensation to be made therefor, only upon the consent of all the parties thereto. Such consent, however, shall be conclusively

presumed as against any party who shall appear and take part in the proceedings to determine the amount of such damage, without first entering an objection to the determination* thereof by such commissioners. In absence of such objection, but not otherwise, the said commissioners shall proceed to final determination of such question.

Term "real estate" defined.

Sec. 16. The term real estate, as used in this act, shall be construed to signify and embrace all uplands, lands under water, the waters of any lake, pond or stream, all water rights or privileges, and any and all easements and incorporeal hereditaments, and every estate, interest and right, legal and equitable, in lands or water, including terms for years, and liens thereon by way of judgment, mortgage, or otherwise, and also all claims for damage to such real estate.

Compensation of Commissioners, Clerks, surveyors, etc. employment of. Comptroller to pay.

Sec. 17. The commissioners appointed in pursuance of this act shall receive as compensation the sum of ten dollars per day for each day actually employed. They may employ the necessary clerks and surveyors. The salaries of the commissioners and of their employees, and the necessary traveling expenses and other expenses incurred in and about such special proceedings, shall be paid by the said comptroller, as provided for in this act, on the certificate of the commissioner of public works of the city of New York.

Waste of water, prevention of.

Sec. 18. For the purpose of preventing any waste of water, the commissioner of public works of the city of New York is hereby authorized to construct such aqueducts, reservoirs, dams, sluices, canals and appurtenances as may be necessary to collect or retain the water in or from any lakes or streams which may be taken under the operation of this act, and use such waters as the wants and necessities of said city may require. Provided that nothing contained in this or in any exist-

* So in the original.

ing act shall authorize or permit any water in excess of the ordinary flow thereof to be drawn from Lake Mahopac and Lake Gleneida, in the town of Carmel, and county of Putnam, between the first day of March and the first day of September in any year. And provided also that nothing in this or in any existing act contained shall be so construed as to interfere with any existing right to catch fish, obtain ice, or keep, use and maintain boats in or upon any natural lake or pond which may be acquired under this act; nor shall it be so construed as to destroy any existing right of riparian owners upon such lakes and ponds to use the waters thereof, or to build upon the shores thereof, except as such rights may be affected by the raising or lowering of the waters of such lake or ponds, as hereinbefore prescribed.

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Sec. 19. It shall be the duty of the comptroller of the city of New York, and he is hereby authorized and directed, on requisition of the commissioner of public works of the city of New York, to raise, from time to time, on bonds of said city, amounts of money sufficient to pay the sums which may be necessary, from time to time, to be paid for the acquisition of any real estate, or for the extinguishment of any right, title, interest therein, to be acquired or extinguished under this act, together with all expenses necessarily incurred in surveying, locating and acquiring title to real estate, or extinguishing claims for damages thereto; and also such sums as, from time to time, may be found necessary for the construction of aqueducts,* reservoirs, dams, sluices, canals and appurtenances as are now in process of construction; and all such payments shall be made by the comptroller on the certificate of the commissioner of public works of the city of New York; provided, however, the amount so raised shall not, in any one year, exceed the limitations which, by law, may

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* So in the original.

be or may have been imposed as to the amount of expenditure to be made by the commissioner of public works.

Sec. 20. The bonds so to be issued by the comptroller of the city of New York, in pursuance of this act, shall be entitled "additional Croton water stock of the city of New York," shall bear interest at the rate of not exceeding seven per cent. per annum, and shall be redeemable in not less than ten nor more than fifty years, as the said comptroller shall determine to be for the best interest of the said city; and the board of aldermen of the city of New York is hereby authorized and directed to raise, from time to time, by tax upon the estates, real and personal, subject to taxation in the city and county of New York, the sum or sums of moneys which may be required to pay the interest on said bonds and to redeem them at maturity. The mayor and comptroller of said city are hereby authorized and directed to sign said bonds, and it shall be the duty of the clerk of the board of aldermen to countersign the same and to affix thereto the seal of the city. Such bonds shall not be disposed of at less than the par value thereof.

Title of bonds.
Interest.
When redeemable.
Payment provided for.
Execution of bonds.
Disposition of.

Sec. 21. The said city or New York is hereby required to repair and forever maintain the highways built or in process of construction by the said city around the new reservoir, on the middle branch of the Croton river, in the town of South East.

Highways, repair of.

Sec. 22. All actions for the recovery of real property, or of any real estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real estate, brought under the provisions of this act, shall be brought and tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in cases provided by statute.

Actions, places of trial of.

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Sec. 23. If in any particular it shall at any time be found necessary to amend any pleading, proceeding, process or action, or to supply any defect therein, arising in the course of any special proceeding authorized by this act, the same may be amended or supplied in such manner as shall be directed by the supreme court, which is hereby authorized to make such amendment or correction.

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pealed.

Sec. 24. All acts and parts of acts inconsistent with this act are hereby repealed, provided that nothing herein contained shall at any time be understood, held or construed to repeal any part of chapter fifty-six of the laws of eighteen hundred and seventy-one, entitled "An act to provide a further supply of pure and wholesome water for the city of New York," passed February twenty-seventh, eighteen hundred and seventy-one, excepting the fourth section thereof, which is hereby repealed, nor to repeal the act amendatory of said act, passed April sixth, eighteen hundred and seventy-one, being chapter three hundred and twenty-eight of the laws of eighteen hundred and seventy-one (*as amended by laws of* 1879, *chapter* 516).

Sec. 25. This act shall take effect immediately.

PART V.

THIS CONSISTS OF A DIGEST OF ALL THE TESTIMONY AND IS ALSO CALLED APPENDIX II.

APPENDIX II.

Digest of all the Testimony.

Witness, Samuel Pine (fol. 31).

Samuel Pine is one of the complainants, a citizen of the United States and of the State of Connecticut. The Byram river bounds his land for a distance of about 3,725 feet on the east. He values it at $50,000. He is working a heavy deposit of feldspar on the property, and uses the water of the Byram river for "all "general farm use, house use and mill use for steam" (fol. 34).

Pine, being recalled by the defendant's counsel, testified, in substance, as follows (fol. 391):

His father bought the farm in 1870 for $13,000 or $13,500. It consists of 102 acres. "We generally raise "about two to three acres of potatoes, about seven or "eight acres of corn; that is our average; * * * "at present we have got four cows, pair of oxen and, I "think, seven horses; * * * since we opened the "quarry, about five years ago, we have cut down our "cattle stock."

He doesn't get the water for the cattle in the winter from the Byram river, but from a little brook behind the barn. He uses the Byram river "for the mill and "summer pasture and house purposes." By using it for the mill he means to supply the boiler with water, the mill being run by steam. He has a canal leading from the river to a cistern, and from the cistern he draws the water for the boiler. The mill runs from ten to twelve hours a day and sometimes all night. The Byram river is the only source of supply of water

for the boiler, and he had always had enough water for that boiler. He owns only on one side of the river.

[*Note*—It is thus to be observed that this plaintiff does not testify to any damage or injury whatever from the diversion of the water.]

Witness, Frederick Muller (fol. 35).

He is the other complainant owning the other farm in Connecticut. The Byram river runs right through his place, so that he owns lands on both sides of it for a distance, counting both sides, of 2,290 feet. He had improved the place some since he bought it. Some of the buildings were going to pieces "a little bit," and he improved them and he improved the land, which was wild. He values the farm at about $8,000. His cattle went regularly for water to the Byram river, and he used it for general farm use.

Mr. Muller was called in his own behalf again at folio 348, testifying substantially as follows:

He had noticed that the water in the West Branch of the river was getting less and less; that in the summer of 1899 the water was almost to a standstill. He could walk through it. There was no movement in it. He had never seen it so low as that. The East Branch of the Byram river flows through his farm. That is, the two streams unite on his farm. Prior to two years ago there was always more water coming through the East stream than the West stream. Before that time the West Branch had the most water in the summer time. After the diversion, and in the dry summer of 1899, the East Branch was better than the West Branch (fol. 352), "but the water gets pretty low in the East Branch during the summer."

(*Cross-examined*, fol. 353):

Mr. Muller's land is a little above Mr. Pine's. The East and West Branches of the river meet right on the

upper or northern line of his farm, so that both branches of the river flow through his farm. There is no dam on the property and the water is used for ordinary farming purposes. There are about 45 acres. The cattle get water out of the river.

"*Q.* Have you ever seen the time when there wasn't water enough below the point where the East Branch of the Byram strikes the West Branch to water cattle?

"*A.* No; I have not" (fol. 356).

Mr. Muller, being recalled by the defendant's counsel, testified (fol. 397) that he used the waters of Byram river for his cattle; he kept twelve head of horned cattle, two of horses. They go to the brook to drink, and always have. The brook is accessible from the fields.

"*Q.* And there has always been water enough in that river to water those cattle, has there not?

"*A.* So far; yes, sir" (fol. 398).

[*Note.*—It thus appears that absolutely no damage whatever has been shown to have resulted from the diversion of water, from Mr. Muller's own testimony, which amounts to this, that he simply uses the water for ordinary farm purposes, particularly for the watering of his cattle, and that there has always been enough water there for that purpose. Neither of the complainants, therefore, show or claim, in their testimony, any damage from the diversion of the water.]

Witness GEORGE W. BIRDSALL, for the complainant (p. 13A).

Mr. Birdsall is a civil and mechanical engineer; Chief Engineer of the Croton Aqueduct for the City of New York and has been in charge of and control of the water supply of the City of New York since 1872, and is familiar with the Byram river.

[*Note*—Here (p. 13B) the plaintiff's counsel offered in evidence chapter 445 of the Laws of 1877 of the

State of New York as amended to date. It may be noted that this is a general statute of the State of New York giving authority to the City of New York to exercise the right of eminent domain for the purpose of acquiring lands and other property interests for purposes of the water supply and providing for compensation to the persons injured. It is one of the general statutes of the State of which the Court will take judicial knowledge without the same being introduced in evidence.]

The other principal ones are—

Laws of 1883, ch. 490, and amendments.
Laws of 1893, ch. 189, and amendments.
Laws 1882, ch. 410, secs. 364–384 (The Consolidation Act).
Laws of 1897, ch. 378, secs. 468–518 (The Greater New York Charter).

Mr. Birdsall then proceeded to give a description of the Byram river and the area of the watershed which it will be unnecessary to repeat here, except that the area of the watershed in New York State is 8.66 square miles. This includes the area between the dam and the Connecticut line (see pp. 13B; 13C).

The dam erected by the City of New York across the Byram river is in Westchester County in the State of New York about 700 feet from the Connecticut line (fol. 9).

Mr. Birdsall then goes into certain facts as to the area of the watershed, the rainfall, the average flow, etc., which it is not necessary to review.

The stream runs along Pine's land 3,725 feet, taking the windings of the stream (fol. 13).

The fall of the stream from the upper part to the lower part of Mr. Pine's land is 26 7-10 feet (vol. 14).

Muller's farm is about three-quarters of a mile north of the north line of Pine's land and extends on both sides of the river 920 feet, and on the west side of the river 450 feet further north (fol. 16).

Mr. Birdsall testified (fol. 45) that with proper storage the City could obtain from the drainage area of 7.66 square miles from which the diversion is made, 7,600,000 gallons of water a day on an average, also (fol. 51–52), that the flow of the main or westerly branch would be about 8-12ths the flow of the main stream at the junction of the two streams.

Mr. Birdsall also testified that if the dam in question diverted all of the water above the dam it would decrease the stream above the junction of the east and west branch about one-half; below the junction about one-fourth (fol. 54).

Mr. Birdsall testified in effect (at fol. 55) that he did not know at what point Mr. Pine could erect a dam without encroaching upon the water rights of other people.

"*Q.* Do you know whether the City has purchased "that water right or the right to divert the stream in "so far as that particular water right is concerned?

"*A. It has paid all the damages for the diversion of the "stream above the Connecticut State line to this water "right*" (fol. 55).

Mr. Birdsall's testimony was continued at folio 69.

The minutes of a conference held April 28, 1897, between owners of property on Byram river and the Commissioner of Public Works were offered in evidence by the complainants. This begins at folio 71. The following is a summary:

The Byram river, from the dam at Portchester, where it enters Long Island Sound, to the New York

State line, is about 45,000 feet on each side. The City of New York has diverted the water from 8.66 square miles of the drainage area of this stream in New York just north of the Connecticut State line. The City of New York has settled, by private arrangement, with all the present mill owners on the stream, which involves, to a certain extent, the settlement of about 15,000 feet of this length of 45,000 feet of the Byram river. Of about 10,000 feet of the lower end of the river, half is in the State of New York and the other half in the State of Connecticut. North between this and the New York State line the whole of the river on both sides is in the State of Connecticut.

The City has settled with the mill owners and with parties who owned land contiguous to the stream on both sides. The City has paid $379,000 for about 15,000 feet. A portion of this 15,000 feet is not fully settled for, because the mill owners had rights of flowage, and the adjoining owners still have to be settled with in some form or shape. There are about 100 of these that have an interest in the balance of the stream. Most of them have small village lots alongside the flowage, so that they really have little interest. There are about 35 all told who have certain rights.

The City of New York has taken nothing but the use of the water. It has not condemned or taken any land (that is, in the State of Connecticut) (fol. 75). The water flows into the Kensico Reservoir, and the claims settled for are below the point at which the stream was diverted. Above that point is in the State of New York, where the City has taken more or less land (meaning by the exercise of the right of eminent domain) contiguous to the stream and is now taking more.

[*Note*—Here follows an argument or conversation between those present at the conference which can

hardly be called evidence of anything (fol. 76–114). It was objected to (fol. 115). We will note, however, the following]:

The Commissioner of Public Works asked this question at folio 77:

"*Q.* Do I understand that the diversion of this "stream takes all the water from the former bed of the "river?

"*A.* (By Counsel for the Complainants) "Roughly "speaking, I understand that during nine or ten "months of the year the diminution of the flow of the "water through the river would be almost nominal. "That during any period of the year when there was "a prolonged drought the flow of the river at the point "where the dam was placed by the City would be prac- "tically stopped. I am trying to make this as fair a "statement as I possibly can.

"(The Commissioner of Public Works) Do I under- "stand that if we settle for damages we may have in- "flicted now this is a settlement for all time, and that "we get a release to that effect, notwithstanding the "fact that at some future time we may be compelled to "take even more water than we take at present?

"*A.* (By Counsel for Complainants) Yes; the plan "is to give a general release of all our rights to any of "the water which may be diverted by the City. Under "this the City will be permitted to take all the water "north of its present dam, and might, very possibly, "in the future take it all."

Counsel for the complainants also stated (fol. 82) the following:

"The average price at which my people are willing "to settle would be about $1.50 a running foot for "each side of the river."

Referring to settlements made by the City with the mill-owners by which $376,000 was paid to them, counsel for the claimants stated as follows (fols. 83, 84):

"This settlement with the mill-owners was made "ten days ago, and they were paid. They have had "the water flow, almost as it had been accustomed to "flow, during some part of the time as it had been "accustomed to flow, and had the benefit of the invest- "ment of their money for ten years. No effort has "been made on the part of the City to make any set- "tlement with any of the property-owners whom I "represent.

"The City has deliberately attempted to take prop- "erty belonging to my clients, who are citizens of "another State, and whose property is in another "State."

Mr. Birdsall, being recalled for the complainants, testified at folio 122 in substance as follows:

If the City of New York diverted all of the water which flowed into the reservoir formed by the dam, the decrease in the flow of the Byram river, just above its junction with the East Branch, would be somewhere between two-thirds and one-half.

Within the State of New York the City of New York has taken condemnation proceedings along the line of the river and its branches by filing maps for more or less of the property. This has been done under the Condemnation Law known as chapter 445 of the Law of 1877 (fols. 137, 138).

The cost of the dam 500 feet from the State line—that is, of the dam alone, without any of its appurtenances—was about $45,000. The cost of getting the water to New York, that is, building the dam and the

whole matter, would be upwards of one million dollars (fols. 141, 142.)

Mr. Birdsall estimated at one time from the facts in his possession that if all of the water of the westerly Branch of the Byram river should be diverted, the damage to the complainant Pine would be $1,862.50, and to the complainant Muller $572.50 (fols. 144–145). This was all objected to as incompetent, improper and immaterial, and on the further ground that no opinion expressed by the engineer of the City Government would bind the City in any event, the City having no general agents.

[*Note.*—This, we believe, is the nearest approach to any evidence of the amount of money damage sustained. It can hardly be considered as evidence at all, nor, if it is admissible, is it entitled to much weight. It is not taken directly in the suit, but from some affidavit, and the surrounding circumstances are not shown. It assumes that all the water was diverted by the dam and Mr. Birdsall does not claim to be an expert on such questions. It is rather an estimate of what it would be reasonable and proper for the City to pay in order to get out of an embarrassing situation.]

Mr. Birdsall, on cross-examination, testified in substance, at folio 158, as follows:

All the action taken by the City (meaning, we presume, in condemnation proceedings) has been in the State of New York and above the East Branch of the Byram river. All the water that has been diverted has risen in the State of New York by drainage area or by springs, and the land that has been acquired has been within the State of New York and the diversion has taken place in the State of New York.

The dam was in operation on May 5, 1899 (fol. 162), and was diverting water then, and had been diverting water since about December, 1896.

It is the intention of the City authorities to divert more or less of the water at the dam all the year around. In the winter season most is diverted. It is also diverted in the summer. On May 5, 1899, there was no water flowing over the dam (fol. 164).

It also appears (fols. 164, 165) that for some seven years the water from the West Branch did not flow through complainants' land when the old dam just above the City's dam was being filled.

[*Note.*—That is, the complainants are in no worse condition now than they had been for some seven years previous to the building of the new dam, during which time, so far as appears, they made no complaint.]

The City of New York owns the fee of the land on which the dam was built. It was paid for in 1884 (fol. 166). In case of all the existing dams, mills and factories, including the Byram Pond Reservoir in the State of New York, the owners have settled with the City of New York for damages sustained by them by reason of the said proposed diversion, and the City has paid to them large sums of money as damages for interference with the natural flow of the said stream, to wit: upwards of $300,000, including the pond reservoir (fol. 169).

Witness EDWIN A. KNAPP for the complainants (fols. 170–224):

He is a real estate dealer in Port Chester, and has been acquainted with the valley of the Bryam river all his life. His father had a farm there. There was not very much difference in the relative size of the East and West Branches of the Bryam river just above their junction. So far as the Eastern Branch was concerned, the witness had "seen it almost entirely dry, just a little water percolating through the bed. This was at a point

over three miles above the junction. He had also noticed a *little* more water flowing through the Western Branch at times of extreme drought. He supposed that the flow of the West Branch "would fill at the dryest times a 6-inch water-main, perhaps; say from 4 to 6 inches." He had seen it in that condition during the summer months, during the period of his younger manhood, at intervals. He had seen it at times of extreme drought, when it would probably fill from a 4 to a 6 inch main. In the summer time he would say that the bed of the river below the junction of the East and West Branches would be not far from 25 feet wide, and at a time of extreme drought there would be water, perhaps, covering the whole of the surface, but just enough to cover it, but not with any considerable depth. He would judge the main Byram river below the junction in the spring or fall to be about 25 feet wide and on an average not far from 2 feet deep (fol. 177). The assessed value of Mr. Pine's farm on the assessment books of the town is $8,000 and of Mr. Muller's farm $2,500. The fair and reasonable value of Mr. Pine's farm is $15,000 (fol. 181, 182).

The average value of farm land along the Byram river in the vicinity of Port Chester is all the way from $100 to $150 an acre. Mr. Muller's place is used entirely for farming purposes, and Mr. Pine's is used in part for farming and also in part for getting out and manufacturing feldspar. Land in the neighborhood is mainly farming property. There are manufacturing interests there which have houses where the operators live. There are a few residential as distinguished from farming places. The witness' valuation of $15,000 is exclusive of the feldspar deposit and the feldspar mill. Assuming that along the line of Mr. Pine's land the flow of Byram river is decreased by the dam by one-fourth or one-third, the depreciation of Mr. Pine's property, in the witness' opinion, amounts to more than $2,000 (objected to, fol. 196).

The witness had never bought or sold a farm in the neighborhood in his life (fol. 206), nor owned any.

The witness thinks that the value of the property would be diminished about 30 per cent. by the taking of one-half to one-quarter of the water, although the old dam had detained the flow for sixteen years and did no injury. In the witness' opinion, during the extremely dry periods, the stream would be so diminished that to a certain extent it would be or perhaps might become a menace to the public health. It might injure the immediate surroundings of the place, and again it might not (fol. 210). "If you diminish the flow of the stream of water in front of a man's place, where the stream is the feature of the place, as is the case of Mr. Pine's, he having over 3,000 feet frontage, you certainly damage the property, in my judgment. * * * You detract from its attractiveness."

The Eastern Branch would supply water enough for ordinary domestic and household uses.

(Fol. 218) The diminished flow of water is a loss of more than $2,000 to Mr. Pine's farm. The damage that would come to Mr. Pine's property comes through the diminished flow of the stream. There is no other element of damage.

Witness DANIEL H. GRIFFIN for the complainants (fols. 229–239).

He owns property on the West Branch of the Byram river on the State line, about two hundred yards from the City dam and between four and five miles from the junction of the East and West Branches of the Byram river. About the middle of August, 1898, he found that there was no stream through his property. There had been a running stream. He had never found the stream dry prior to the construction of the dam. He

claims damages against the City for taking his property, and had talked with lawyers about it.

Witness LAWRENCE B. JENCKES for the complainants (fol. 260).

He is Superintendent of Public Works for the City of Stamford, and a civil engineer, graduating from the Sheffield Scientific School of Yale College in 1887. He had examined Mr. Pine's property on the 25th of May, 1899, and examined the water rights or privileges. The witness found at the lower end of Mr. Pine's land a pond held back by a dam about thirteen feet high, and at the head of that pond the Byram river flows through a rather steep valley, where a dam could be erected.

[*Note*—This was objected to by counsel for the City, as it appeared that Mr. Pine owned only one side of the river.]

The witness stated (fol. 267) that a dam could be erected at the head of the pond at the lower end of Mr. Pine's land with reasonable cost, which would throw the water back to the upper end of Mr. Pine's land. The dam would have to be about 10 feet high. The witness had never bought or sold or rented water power.

At folio 285 this question was asked of the witness:

"Now, Mr. Jenckes, assuming the case of a river "about 12 feet wide in which the average flow was "24,000,000 gallons per day through a valley of "a size which permitted, by the construction of a "dam, a pond of about half a mile long about 200 "feet wide, at the dam 12 feet wide, at the upper "end, being about 500 feet wide at its widest part, and "the fall at the dam being about 10 feet, can you, as a "civil engineer, state from these facts the horse-power "which could be developed at the dam, it being ad- "mitted that Mr. Pine only owns one side of the river."

"*A.* Yes, sir.

"*Q.* Now, will you state the horse-power?

"*A.* About 40 horse-power—I beg pardon (referring "to paper), 33 horse-power, that should be.

"*Q.* Now, is there known to the profession of civil "engineering a value to such horse-power?

"*A.* No definite value.

* * * * * *

"*Q.* Is there a known figure of cost of the production "of horse-power by steam?

"Objected to as irrelevant, incompetent and imma- "terial.

"*A.* It varies so at different points that I couldn't "give any definite answer.

(Fol. 291) "*Q* Have you made an estimate of the "cost of reproducing the 33 odd horse-power there "which you say could be determined from repro- "ducing it in steam?

"*A.* Yes, sir; * * * it would cost to produce "33 and a fraction horse-power by steam in a similar "plant to the one at present operated, about $1,080 a "year." * * *

(Fol. 300) Finding this estimate at five per cent. The amount would be about $21,000. Deducting $5,000 for the cost of developing the horse-power, the net result would be about $16,000.

If the assumed flow of 24,000,000 gallons per day were reduced to 16,000,000 per day, the net result would be about $10,000, or under the hypothetical conditions, a net loss of about $6,000.

[*Note.*—This appears to be the cost placed by the witness in his direct examination upon a steam-power equal to the water-power on the Pine property under

the hypothetical questions, and an attempt to show that the diminution in the flow would result in a loss of $6,000 to the value of the alleged water-power.]

On cross-examination this witness testified (fol. 311), that he had assumed that the dam had been built and had a right to remain there.

[*Note.*—It appears that Mr. Pine only owns on one side of the river, and the dam, if erected, would overflow land on the opposite shore belonging to others.]

(Fol. 315) "*Q.* Then you are assuming, are you not, "that the man operating the mill, or whatever you may "call it, has the legal right to shut that gate to a cer- "tain extent?

"*A.* Yes, sir.

"*Q.* A perfect legal right; then if he did not own "that legal title, and it was put to you as a hypothetical "question that he, the owner, did not possess that "right, your answer, of course, would be different?

"*A.* Yes, sir.

(Fol. 326) "*Q.* You have stated in your direct exam- "ination that you could not state the value of the "power, but could tell Mr. Marshall the cost to repro- "duce it; that is correct?

"*A.* Yes, sir.

"*Q.* You don't pretend to come here and state the "market value of a water-power or mill-power on that "river; that is to say, what it would bring in the mar- "ket between private individuals?

"*A.* No, sir.

"*Q.* Is it or is it not a fact that it might cost con- "siderable money to develop the power in a region "where there would be no market?

"*A.* Yes, sir."

* * * * * *

(Fol. 328) "*Q.* As an engineer, with the exception "of the water necessary to be furnished for the boilers

" at this feldspar mill, how would the deprivation of " the water of the Byram river affect running the mill?

" *A.* It would not affect it, with the exception of the " water for the boilers."

The feldspar mill is about 150 feet from the Byram river. The only water that is conducted to it is in a pipe for the supply of the boilers. The mill is not dependent upon the flow of the river for the purpose of creating power. The pipe is about one and a half or two-inch pipe. A donkey pump was used to pump the water through a two-inch pipe into the boilers, and that is the only use at the time the witness was there to which the waters of the Byram were put. The fall of the stream through the Pine property was 9.92 feet.

* * * * * *

(Fol. 336.) " *Q.* It is practicable at that particular " point to build a dam 15, 20 or 25 feet economically " to develop a greater amount of horse-power?

" Objected to unless confined to the lands of the " plaintiff.

" *A.* It is practicable; yes; it is possible; possible, " that is better.

" *Q.* Is the topography of the land such as to enable " one to do that, at that point, at the foot of the little " valley to which you have referred?

"*A.* Yes.

" *Q.* Then it would be, in your opinion, practicable to " develop a considerable horse-power at the foot of " that little valley you have referred to?

"*A.* I couldn't say as to the practicability of it with- " out looking into it further."

[*Note.*—We think the witness failed to show a water-power on Mr. Pine's land of any value.]

Witness NEWTON S. JOHNSON, for the complainant (fol. 339).

He has lived on Mr. Pine's place seven years, and Mr. Pine is his father-in-law. He looks after the feldspar mill. Mr. Pine's farm consists of 106 acres. The waters of the Byram river he uses for feeding the boiler and also for household purposes, and the pasture lots lie on it. The stock kept on the Pine farm consists of six head of horned cattle, and five or six horses. The witness had never seen the waters of the Byram river so low that cattle could not get enough to drink. There is a well on the property which is used for drinking water. Nearly every winter water is taken from the river and carried for the cattle. The cattle were watered from the river at the extremely dry times. The river has nothing to do with the feldspar plant, except for furnishing water for the boiler. It is an 80-horse boiler. A donkey pump or injector is used for taking water from the cistern for the boiler, and there has always been water enough for that. The plant is run by steam.

Mr. Johnson, being recalled, testified (fol. 358), when certain photographs, taken August 31, 1899, were introduced; there is a pond, the size and depth of which the witness describes (at fol. 362), formed by damming the Byram river, and Mr. Pine owns on one side of that pond.

Witness SAMUEL VAIL, for the complainant, testified (fol. 374):

He is the engineer of Mr. Pine's feldspar mill. Taking it on an average the year round there wasn't a great deal of difference in the flow of the water between the East and West Branches. The feldspar mill has not been running every day, but only when it had work to do. The mill is run by steam, and the only use made of the waters of the Byram river by it is to feed the boilers, for which purpose there has so far been water enough.

(Fol. 386.) Certain Connecticut statutes were offered in evidence subject to objection, to wit:

An act to encourage the erection and support of water power manufactories.

Chapter 26, Public Act of Connecticut, 1863 and 1864; affirmed July 6, 1864.

General Statutes of Connecticut, 1875, chapters 472, 473, 474.

General Statutes of Connecticut, 1880, chapter 92.

General Statutes of Connecticut, 1875, chapter 234, section 18.

General Statutes of Connecticut, Revision of 1887, in force January 1, 1888, sections 1216 to 1225, and section 2687.

It was stipulated under objection (fol. 387) that if Lawrence B. Jenckes were recalled he would testify that he assumed the average flow of 24,000,000 gallons per day, or 1,000,000 gallons per hour, and that power would only be used ten hours a day, as in ordinary manufacturing, and that sufficient pondage could be obtained to maintain a flow of 1,000,000 gallons per hour for ten hours, or 10,000,000 gallons per day.

COMPLAINANTS' TESTIMONY CLOSED.

A motion was then made (fol. 390) to dismiss the complaint and all the proceedings taken thereunder, on the ground that there is an improper joinder of parties; and on the further ground that no damage whatever has been proven; on the further ground that the plaintiff has not proven irreparable damages and that the City of New York is adequately responsible and able to pay any monetary damages.

Testimony for the defendants was then taken.

The complainants were recalled and testified as stated above.

[*Note.*—Neither of them testifies to any injury from the diversion.]

FREDERICK K. BETTS, called for the defendant (fol. 398):

He is an assistant engineer of the Department of Water Supply of the City of New York, and is stationed at Kensico, about two and a half miles from the Byram river. He has made surveys of that river, and is perfectly familiar with it. The City of New York has built a dam within the State of New York on the West Branch of the Byram river. The witness kept the flow of water for one summer at the point where the dam is located; that is, of the West Branch only. Gaugings were taken from June to December, in 1895, a dry summer. The witness then states the average daily flow of the river. For the 18.22 square miles it would average over 1,000,000 gallons per day. During the entire summer of 1895 there were just ten days when the flow was less than 1,000,000 a day. The very least flow recorded for any day, and that for one day only, was 462,296 gallons (fol. 405), and that was in the month of September.

The witness then testifies as to the amount of rainfall in certain months. The average rainfall, based on sixteen years' observation, is 47.93 inches per year. The dam was completed by the City in 1896. In 1895, when the gaugings were taken, the City was excavating for the reservoir there. The drainage area diverted by the dam is 8.66 square miles.

The City is diverting water from an area of 8.66 square miles. The witness' memorandum is upon the

basis of the flow from the drainage area of 8.66 square miles (fol. 407). "The area of the East Branch, of all "the Byram river above Pine's, exclusive of the diverted "area, I measured to be 18.22 square miles.

"*Q.* That is what I asked you; then you are not at "the present time, and never have been, diverting any "part of the 18.22 below the dam built by the City?

"*A.* We have no means of diverting it" (fol. 432).

NATHAN J. HUGHES testified for the defendant (fol. 434):

He is pumping engineer for the Village of White Plains. The capacity of the cistern out of which water is taken by Mr. Pine for the boiler up to the level of the brook is 1,700 gallons. That is what it will hold. A canal leads from the river to the cistern and a pipe connects the cistern with the boiler. Assuming that the boiler is an 80-horse-power boiler, it would take 285 gallons per hour of water to supply it running under full head.

WILLIAM L. BANKS, testified for the defendant (fol. 438):

He has bought and sold real estate in large quantities in the neighborhood and is familiar with the Byram Valley and qualified as an expert. He described Mr. Pine's farm as follows (fol. 441): "It is "rather a rough farm, not much level land and a part "of it along the river; the southerly part of it is rock "or rock cropping out covered with a thin soil; the "northerly part along the bed of the river is more "smooth and more productive; the westerly part is "hilly, sloping to the east, most of it; there is some "good land on the westerly part of it."

He visited the farm December 3, 1899. He found the water running over a bed about 20 feet in width

and an average depth of 6 inches. There was then water enough for the uses of the farm. He values the Pine farm at $10,000, and testifies (fol. 444) that the diversion of the water has not decreased the value of the farm, in his judgment, at all.

He describes Muller's farm as follows (fol. 445):

"His farm, the easterly portion of it, is a smooth "bottom land along the valley of the Byram river; he "owns on both sides of the river; the westerly part of "it is meadow and more hilly and some rock; the "house stands back from the road and a lane leads up "to it; the buildings are in fair condition; there is a "good orchard at the northerly part—a very good "small farm."

On December 3, 1899, there was water in the West Branch of the Byram river flowing in the old bed of the West Branch then. The witness estimates the Muller property as worth from five to six thousand dollars, not to exceed $6,000 (fol. 447). The diversion of the waters does not affect its value. "There is suf- "ficient water for all purposes in the river and in the "little stream that runs through it into the river "also" (fol. 447). Eliminating that stream entirely there is sufficient water there for all purposes. There was about half of the quantity of the East Branch (fol. 448). At folio 479 the witness, on cross-examination, testifies again, "in my judgment his (Mr. Pine's) "property has not been damaged by reason of what "water has been taken; it has not been increased, "however." Assuming that the City has diverted 7,000,000 or 8,000,000 gallons of water, one-third of the stream, Mr. Pine's property is not affected thereby for any purpose that the witness knows of at present, or for the future, that he can conceive.

If it were possible to make a pond on Mr. Pine's land the decrease in the flow of water would be a loss and damage to him as a land owner (fol. 483).

WILLIAM H. HOYT was called for the defendant (fol. 500):

He is a real estate dealer and agent of thirty-one years' experience. He described the Pine farm (at fol. 506) as "an ordinary farm for that section of the country; it is "what I regard as a rough farm * * * ; I mean that "the predominant acres of the farm are very rough "pasture and woods." He owns on one side only of the river. "He has no road front except by right-of-way "over the bridge across the river."

Mr. Hoyt regards the 44-acre Muller farm as a very good farm (fol. 507). "Principally the majority of the "farm is meadow and bottom, also tillable land, about 5 "acres of wood and rough pasture." Witness testifies (at fol. 510) that so far as he can judge, the diversion by the City of the waters of the West Branch of the Byram river makes no difference to the value of the property. "There "is a great abundance of water, a great surplus of water, "so far as the necessities of the farm is concerned" (fol. 512).

He values the Pine property at "$9,000, or $90 an acre" (fol. 513). When asked how far the farm was from the nearest railroad station he said that it was about four miles from Portchester and about the same distance from Greenwich. The farm is in a cheap neighborhood and does not give evidence of having been kept up in a good state of cultivation.

The witness valued the Muller property at $6,600. When asked (at fol. 514) what difference in value, if any, has been caused by the City diverting the waters of the West Branch of the Byram river, he answered, "I "think no difference." There was "abundance of water

"and for forty more farms like it." The diversion of all the water of both the East and West Branches would diminish the value of the land (fol. 519). Whether if the water was diverted to the extent of one-half the land would be damaged, "would depend entirely upon "the uses to which the water is put and the demand "for it" (fol. 520).

CHARLES L. AUSTIN, called as a witness for the defendant (fol. 528):

He is a real estate dealer in Portchester. He testified that there was plenty of water on the farm for all farming purposes.

J. HENRY CLARK, called as witness for the defendant (fol. 536):

He testified that he had known the Byram river in the neighborhood of the Pine and Muller property for about sixty years and was a farmer. He calls the Pine farm a "fairish sort of farm; it is pretty rough * * *; "plenty of water by it apparently." There was water flowing by the Muller property coming down the West Branch of the river; very nearly as much as the East Branch. There was plenty of water for all ordinary household, domestic and farm uses on these two properties. More than could be used for farm uses. "Enough water there, I should judge, to water 500 "head of cattle, flowing down that river now."

GEORGE W. BIRDSALL, recalled for the defendant (fol. 542):

He testified that portions of the Twenty-third and Twenty-fourth Wards of the City of New York were supplied with water from the Bronx, Byram and Rye ponds, and that about 125,000 people were dependent upon that supply for their water. About 7-20ths of

the supply for these 125,000 people is furnished by the waters of Byram river, and about the same amount of water for fire protection in the Twenty-third and Twenty-fourth Wards. Certain portions of the Twenty-third and Twenty-fourth Wards are supplied solely from the Byram supply.

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[REG. 49. FOL. 414.]

Supreme Court of the United States.

OCTOBER TERM, 1901.

THE CITY OF NEW YORK and BIRD S. COLER, as Comptroller thereof,

Appellants,

against

SAMUEL PINE and FREDERICK MULLER,

Appellees.

Statement and Points by the Corporation Counsel of The City of New York in behalf of the Appellant.

This case comes before the Supreme Court of the United States by virtue of its writ of certiorari directed to the United States Circuit Court of Appeals for the Second Circuit. The decision of the said Circuit Court was rendered on October 30, 1901, but this decision was by a divided court. Judge Thomas wrote the prevailing opinion, Judge Wallace concurring, while Judge Wheeler wrote a dissenting opinion which sustains the position taken by the appellant, the City of New York.

The action is in equity. The appellees in 1896 filed their bill in the United States Circuit Court, for the Southern District of New York, to restrain the City of New York from diverting a part of the water of the Byram river from its natural channel into the reservoirs and water supply of the City. The diversion or intended diversion takes place in the State of New York where the stream has its origin.

As the matter now stands the City is under a perpetual injunction in the broadest terms absolutely prohibiting it from using any part of the West Branch of the Byram river for its water supply, although all of said West Branch above the point of diversion is entirely within the State of New York.

The diversion of this stream has taken place under the authority of certain statutes of the State of New York purporting to give authority to the City of New York to do the acts complained of.

The facts are simple and undisputed. The only controversy on the hearing in the Circuit Court was whether there was any real damage to the plaintiffs from the diversion of the water. The complainants themselves admitted that they had suffered no substantial damage, and at most the evidence of damage was very unsatisfactory and of a comparatively insignificant amount. We do not of course expect this Court to examine the question of fact, but we shall assume the most that the plaintiffs can claim, to wit, that they did suffer some small amount of damage by the diversion of the water.

The complainants are citizens of and residents in the State of Connecticut and owners in fee, respectively, of two farms situated on the Byram river.

The defendant is a municipal corporation of the State of New York and as such a citizen of that State;

so that the Circuit Court acquired jurisdiction, if at all, by virtue of the fact that the parties were residents of different States.

The Byram river is a non-navigable stream of fresh water flowing into Long Island Sound.

Tracing its course up stream from the Sound, for a short distance it forms the boundary between the States of New York and Connecticut, then deflects to the east, and for some five or six miles is entirely within the State of Connecticut, during which time it flows through or along the side of the two farms belonging to the complainants.

Mr. Muller's farm is the one further up stream. On the northern boundary of that farm the river divides into two branches, the East Branch being entirely within the State of Connecticut.

Following the West Branch up stream a short distance, we come to the boundary line between the States of New York and Connecticut, beyond which line the West Branch with all its ponds and tributaries is entirely within the State of New York.

The City of New York, acting under authority of the Legislature of the State of New York, at the time of the institution of this suit was building a dam across the said West Branch entirely within the State of New York and about 700 feet from the Connecticut line, the effect of which dam, when completed, would be to divert a part and at certain times perhaps all of the water of the said West Branch of the Byram river, having its origin above the said dam, from its natural channel into the pipes and reservoirs and water supply of the City of New York.

Said action would, of course, to some extent, lessen the natural flow of the stream past the complainants'

property, but the East Branch would be entirely unaffected and also the part of the West Branch originating below the City's dam, so that the complainants could not be deprived of more than about one-quarter, as is shown by the testimony (fol. 54), of the natural flow of the Byram river.

In the bill of complaint it is alleged that the complainants and each of them would be damaged in the sum of $2,400 and more by the alleged illegal diversion of the water and hence they pray for an injunction restraining the defendant, its officers and agents, from building the said dam and from maintaining or continuing to maintain the same and from diverting the water.

The defendant alleges that the intended diversion would cause little if any injury and damage to the complainants, and alleges, in effect, that it has taken proceedings to acquire title to large quantities of land in the vicinity for constructing dams, aqueducts, reservoirs and other structures necessary for its supply of water, and has expended upwards of $30,000,000 in providing for said water supply.

It avers that the dam will be of great and permanent benefit to the City of New York and its residents and to all persons dwelling therein, and *avers that it is and always has been amply able and willing to pay any damages that the complainants may suffer from being deprived of the water that naturally comes from the said West Branch of the Byram river.*

(1) As to the Damage to the Complainants. -

Judge Shipman, before whom the case was tried at Circuit, writes as follows in his opinion:

> "Testimony was offered by each party with respect to the value of the two properties and the amount of pecuniary damage in consequence

of the diversion of the water. That there will be an actual, continuing, pecuniary damage more than nominal in amount is manifest, but whether more or less than two thousand dollars or what will be the exact amount I did not undertake to find because it was unnecessary.

"In the absence of a plea to the jurisdiction the allegation in bills in equity that the amount of damage in each case exceeded two thousand dollars, 'though denied by the answer even if not 'sustained by the proof, was sufficient to give 'the Circuit Court jurisdiction' (citing cases).

"A number of unknown factors enter into an estimate of damage from a diversion of water, such as the probabilities of future years of excessive drought; the prospective uses to which the properties may be applied, and the prospective demands for other than agricultural uses which cause the estimate of actual pecuniary damage to be one of inaccuracy."

As intimated, we do not expect this Court to review the question whether there was actual, substantial damage to the complainants, but shall assume the most that they can claim under Judge Shipman's decision, to wit: That they did suffer some small amount of damage by the diversion of the water.

It is, however, open to us to urge that this damage is very small and almost insignificant compared with the loss and damage that would result to the defendants if the injunction in this case were to remain in force.

We will, therefore, very briefly refer to the testimony:

Mr. Pine's farm consists of 102 acres. He values it at $50,000, although his father bought it in 1870 for about

$13,000. Its assessed value on the assessment-books of the town was $8,000, and the valuation put upon it by the experts of the defendant was $9,000 or $10,000, and the value put upon it by the complainant's experts was $15,000.

Mr. Pine works a heavy deposit of feldspar on the property, but the mill for grinding it is *run by steam*, and the water of the Byram river is used merely to supply water for the boiler. Mr. Pine describes the use to which he puts the land as follows (fol. 392):

> "We generally raise about two to three acres of potatoes, about seven or eight acres of corn; that is our average. * * * At present we have got four cows, one pair of oxen and, I think, seven horses. * * * Since we opened the quarry, about five years ago, we have cut down our cattle stock."

He doesn't use the water of the stream even for his cattle in winter, and only uses it to supply water for the boiler, and he has always had water enough for that purpose. *He only owns lands on one side of the river.*

Mr. Muller's farm consists of about 45 acres. He values it at $8,000, and its assessed value upon the assessment books of the town is $2,500, and the experts called for the defendant valued it at from $5,000 to $6,000. The water is used only for ordinary farming purpose. Mr. Muller testified that he used the stream for ordinary farm purposes, and that his cattle went to the river to drink, and that there had always been enough water in the river for that purpose.

It is thus to be observed that neither of the complainants in their own testimony show or claim any damage from the diversion of the water.

All of the other evidence on the amount of damage is as indicated below.

Mr. Birdsall, the City's Chief Engineer as to its water supply, was called as a witness for the complainants and testified that the damage to Mr. Pine's property would be $1,862.50 and to Muller's $572.50 (fols. 144, 145).

This evidence was duly objected to and can hardly be considered evidence at all, nor, if admissible, is it entitled to much weight. It was not taken directly in the suit, but in some affidavit, and the surrounding circumstances are not shown.

It assumes that all the water in the West Branch was diverted, which is not the fact, and Mr. Birdsall is not an expert on such questions. His testimony is rather an estimate of what it would be reasonable and proper in his opinion for the City to pay in order to get out of an embarrassing situation.

Mr. Knapp, a witness for the complainants, testified that the injury to Mr. Pine's property amounted to "more than $2,000" (fol. 196).

Mr. Jenckes, a Civil Engineer, testified on direct examination to the effect that under certain hypotheses a diversion of the water would diminish the value of the Pine property by $6,000.

This was on the theory that there was a water power on Mr. Pine's land which was injured by the diversion of the water and that, in order to make this injury good, by the substitution of steam power, it would cost $6,000.

This theory was overthrown, however, as we think, it appearing that Pine owned on one side of the river only and, hence, could not construct a dam so as to have a water power, and it appearing as a matter of fact he had made no attempt to make use of any water power on his land, but was running a mill to grind feldspar *by steam power.*

As to Muller, there was no testimony whatever to show any damage to his property, except that of Birdsall, mentioned above (*i. e.*, $572.50).

The witnesses for the defendant testified that the diversion of the water did not diminish the value of the farms at all.

To sum up the situation as to Pine, the testimony, such as it was—and none of the testimony is entitled to much weight—places the estimated damage at from nothing to $6,000.

There is no finding by the Circuit Court Judge as to the actual amount of damage, but he undoubtedly considered it small, as is evident from what we have quoted above from his opinion, and if we assume that in the case of Mr. Pine it was $2,000, we think that is entirely fair to the complainant.

As to Muller, the highest testimony, if even it could be deemed to be testimony, was $572.50, which, in the present relations, may fairly be said to be trifling.

(2) As to the Damage to the Defendant if the Injunction is Sustained.

The decree of injunction appealed from is as follows:

> "This cause came on to be heard at a Term of the United States Circuit Court for the Southern District of New York, and was argued by counsel and thereupon, upon consideration thereof, it is
>
> "Ordered, adjudged and decreed as follows, to wit:
>
> "That the complainants in this suit and each of them are entitled to the injunction order of this

Court restraining the defendant, its successors and assigns, their and its officers, agents and employees, each, all and any of them, from diverting the water or any part of the water of the West Branch of the Byram river or any part of the water of the Byram river, or in preventing in any way said water or any part thereof, at any time from flowing through its natural channel, before, at and below the junction of the two branches of said river; and it is further

"Ordered, adjudged and decreed that the defendant, its successors and assigns, their and its officers, agents and employees, each, any and all of them, be and they and each of them are hereby perpetually enjoined from diverting the water or any part of the West Branch of the Byram river, or any part of the water of the Byram river, or in preventing in any way said water or any part thereof at any time from flowing through its natural channel, before, at and below the junction of the two branches of said river; and it is further

"Ordered, adjudged and decreed that a writ of injunction do issue on the first day of November, in the year nineteen hundred, against the defendant, its successors and assigns, their and its officers, agents and employees, and each, any and all of them, commanding them to comply with all and singular the premises, matters and things so enjoined upon them; and it is further

"Ordered, adjudged and decreed that the complainants, and each of them, recover their costs in the premises, to be taxed by the Clerk of this Court.

"Dated July 24, 1900.

"N. SHIPMAN,
"Circuit Judge."

The injunction is thus in the broadest terms, and, if sustained, the City will be absolutely prohibited from using any part of the West Branch of the Byram river for its water supply, although all of it above the dam is entirely within the State of New York, where the said West Branch has its origin.

Elaborate statutory provisions have been enacted by the State of New York giving the City of New York the power to exercise the right of eminent domain in order to secure the right to this water for the City's water supply, and providing amply for the payment of damages.

The principal statute is chapter 445 of the Laws of 1877.

There are also other statutes intended to accomplish the same object, of which doubtless this Court would take judicial notice if it were necessary to refer to them.

The statute of 1877 with its amendments has been printed as an appendix to this brief for convenience of reference. It appears that the City has acquired by purchase and through condemnation proceedings under the said statute all land and property rights in the State of New York affected by the diversion and the lands on which the ponds and lakes are.

> "It has paid all the damages for the diversion of the stream above the Connecticut State line to this water right" (fol. 55).

The City has settled by private agreement with all the mill-owners along the stream and with owners of various property rights below the dam, including those in Connecticut, paying $379,000 therefor (fols. 71–73).

That is, it has settled with all the people seriously injured.

The City has filed maps under the condemnation statute of 1877 for more or less land along the line of Byram river and its branches, which proceedings, it would seem, were not all concluded at the time of trial of this action.

The cost of the dam alone without any of its appurtenances was about $45,000 (fol. 141), and the cost of the dam and work connected therewith "has already "cost the City of New York upward of $1,000,000, and "will cost the City much more" (fol. 143). The ownership of the dam and pond was acquired by the City and paid for in 1884 (fols. 164–167). The direct cost to the City of New York of what has already been done to secure additional water supply by diverting a part of the Byram river is thus—

Cost of dam and work connected therewith to get the water to New York, upwards of	$1,000,000 00
Damages to mill owners, etc	379,000 00
	$1,379,000 00

Even this we understand does not include the amount to be paid for all of the land in process of condemnation, nor the effect on the City's general water supply system, which has cost upwards of $35,000,000.

It further appears (see fols. 542–545) that portions of the Twenty-third and Twenty-fourth Wards of the City of New York are supplied with water from the Bronx, Byram and Rye ponds; and that about 125,000 people are dependent upon that supply for their water. About seven-twentieths of the supply for those people is furnished by the waters of the Byram river, and they are similarly dependent for water in case of fire.

The great damage and injury that will result to the defendant if this injunction is sustained is thus evident.

It will mean the direct loss of some $1,500,000; a substantial diminution of the City's water supply, already inadequate; an interference with the general water supply system of the City upon which it has expended upwards of $30,000,000.

Last but not least it involves practically an adjudication that every State in the Union is restricted as to the water supply of its own municipalities to streams which do not anywhere below the point of diversion flow into another State.

If an injunction will lie in a case like this, it will lie in any case where a diversion has been made in one State from a stream flowing into another State.

(3) As to Efforts to Settle.

Considerable space is taken up in the testimony (fol. 68–118) by accounts of settlements made with other individuals and of conferences held between City officers and representatives of the complainants. The possible damages were estimated all the way from 10 cents (fol. 87) to $4 (fol. 81, 82) per running foot of the frontage on the stream, and it may be said that it appears from the evidence that the City had a standing offer to settle at the rate of 50 cents per running foot (fol. 113) and even $1.50 per running foot was advised by one of the City's representatives (fol. 113).

It cannot therefore be said that the City has refused to negotiate or has acted arbitrarily.

What the City asks is that it shall not be coerced if it cannot agree with the complainants. The question of damages should be settled by some competent tribunal; and before any such tribunal it is willing to go, and indeed it can be compelled to go before the Federal Courts; and with this it is satisfied.

(4) SUMMARY.

The above contains, we believe, a sufficient statement of all the facts that it will be necessary to consider in order to determine the legal questions involved.

It is to be remembered that all we are contending for in this suit is that the special remedy by injunction shall not be enforced.

We are not maintaining that the complainants have no action for damages. That is an entirely different proposition. We concede that the complainants are entitled to recover in an action in the courts of the State of New York, or in the Circuit Court of the United States, whatever damages they can show they have sustained.

We contend that the complainants have not an absolute right to an injunction, and that they cannot refuse to avail themselves of the other remedies which the law allows, and insist upon an injunction involving enormous pecuniary loss to the defendant and great public injury and inconvenience—the only loss or injury to themselves being small and easily compensated for in damages, which damages the defendants are willing, ready and able to pay.

It was written by the Supreme Court of Pennsylvania in *Robb* vs. *Carnegie*, 145 *Penn. St.*, 324, as follows:

> "*An injunction is not of right but of grace, and*
> "*will never be issued by a Court of Equity when it*
> "*will inflict a greater injury than it will prevent.*
> "*In such a case the injured party will be left to his*
> "*redress at law.*" (See under our Fourth Point below.)

The complainants, however, insist that they are entitled as of right to a perpetual injunction restraining the said diversion, and will not accept compensation for damages they may have suffered nor submit the question to any tribunal. Being citizens of Connecticut they claim that the laws of New York State have no application, and that the contest is really under common law rules between an upper and lower riparian proprietor, who are both private citizens.

The contest, however, is vastly more important. It relates to public matters of the gravest importance.

If this injunction is to be sustained the following proposition must be held to be true: There is a large class of property or property rights in a State which is not subject to the exercise of the right of eminent domain by that State—a class of property which there is no means of using for public purposes because there is an easement or servitude attached to the same, held or owned by the citizens of another State, which the first State is powerless to do away with, and which renders the said property or property rights within its own territory unavailable for itself or its own citizens. In other words, the State in which the said property and property rights are situated does not control the same, but another State or the citizens of that other State.

It is respectfully submitted that this result must logically follow from the decision of the Court below. A doctrine which arrives at this result we submit with much confidence should be thoroughly examined by the Supreme Court of the United States.

If the prevailing opinion in the Court below is correct, then there is no means known to the law whereby a State can make use for the most necessary public purpose of the water of a stream arising in its own territory, if that stream eventually runs into another State.

Any abutting land-owner in the other State, no matter how little the diversion of the water may injure him, or perhaps if it does not injure him at all, can immediately enjoin the diversion.

The first State is absolutely powerless, no matter how liberally it may be willing to compensate the citizen of another State, no matter how complete a scheme it may provide through its courts for the payment of damages.

The consequences of such a doctrine are evident. The instances, taking the whole of the United States, where a stream of water arises in one State and eventually flows into another State are legion. The result of the doctrine laid down by the Court below would be that the lower riparian owners in a foreign State may absolutely prohibit the use of water for public purposes of the upper riparian proprietors in another State.

A State in which water rises and flows for scores of miles would have no control of the water, could not by any legislative act change the rules of the common law within its own borders, and could not pass laws which would allow diversion of any of this water even for public purposes. In other words, cities, towns and villages would be unable to use all the waters of their own State for purposes of drinking and cleanliness, extinguishment of conflagrations and other municipal purposes.

The City of New York in building this dam and diverting the water is acting under authority of the State of New York, and has the entire power of that State in the premises.

To say that the City of New York cannot build this dam and divert the water is equivalent to saying that the State of New York cannot do it.

In the present case the State of New York has done all that it is possible for a State to do in the way of authorizing the acquisition of the right claimed in this case, and has provided a scheme by which compensation must be paid, and the power of the courts, Federal as well as State, is sufficient to enforce payment of whatever damages the complainants may have suffered.

FIRST POINT.

We state under this head what we consider to be the common law which prevails in the States of New York and Connecticut, relating to the diversion of water from a non-navigable stream, where there is no question as to governmental or public right, but only private individuals are concerned.

The law is thus laid down by Chancellor Kent in volume 3 of his Commentaries, at page 439:

> "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Although he may use the water while it runs over his land, as an incident to the land, he cannot unreasonably detain it, or give it another

direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above without a grant, or uninterrupted enjoyment of twenty years, which is evidence of it."

This statement of the law is quoted with approval and stated to be undoubted, and to be the rule in those States in the Union which have simply adopted the common law, in

United States vs. *Rio Grande Co.*, 174 U. S., 690 (1899).
Atchison vs. *Peterson*, 20 Wall, 507.

An illegal diversion of water is technically a private nuisance, the remedy at common law being damages to be recovered in an action, in trespass on the case generally, and Courts of Chancery also have concurrent jurisdiction.

Gardner vs. *Newburgh*, 2 Johns. Ch., 162.
Merritt vs. *Brinkerhoff*, 17 Johns, 306.
Crooker vs. *Bragg*, 10 Wend., 260.
Wadsworth vs. *Tillotson*, 15 Conn., 366.

There are innumerable cases on the subject, but it is unnecessary to refer to them at length.

There is no substantial difference between the learned counsel for the complainants and ourselves on this phase of the subject.

The defendants are only concerned with one of these remedies, to wit, the remedy in equity. They invite the complainants to make use of their remedy in damages at common law.

The principal cases have been cited and summarized in the late and important case of

> ***Strobel* vs. *Kerr Salt Co.*, 164 N. Y., 303 (1900). (Motion for reargument denied, 165 N. Y., 15.)**

The following is from the opinion in the *Strobel* case:

> **"A riparian owner is entitled to a reasonable use of the water flowing by his premises in a natural stream, as an incident to his ownership of the soil, and to have it transmitted to him without sensible alterations in quality or unreasonable diminution in quantity."**
>
> **"While he does not own the running water, he has the right to a reasonable use of it as it passes his land. As all other owners upon the same stream have the same right, the right of no one is absolute, but is qualified by the right of others to have the stream substantially preserved in its natural size, flow and purity, and to protection against material diversion or pollution. This is the common right of all, which must not be interfered with by any. The use by each must, therefore, be consistent with the rights of the others and the maxim of *sic utere tuo* observed by all. The rule of the ancient common law is still in force; *aqua currit et debet currere, ut currere solebat.***
>
> **"Consumption by watering cattle, temporary detention by dams in order to run machinery, irrigation, when not out of proportion to the size of the stream, and some other familiar uses, although, in fact, a diversion of the water, involving some loss, are not regarded as an unlawful diversion, but are allowed as a necessary incident to the use in order to effect the highest average benefit to all**

the riparian owners. As the enjoyment of each must be according to his opportunity, and the upper owner has the first chance, the lower owners must submit to such loss as is caused by reasonable use. Surrounding circumstances, such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business, and *the indispensable public necessity of cities and villages for drainage* are also taken into consideration, so that a use which under certain circumstances is held reasonable, under different circumstances would be held unreasonable. It is also material, sometimes, to ascertain which party first erected his works and began to appropriate the water. * * *

"The question of reasonable use is generally a question of fact, but whether the undisputed facts and the necessary inferences therefrom establish an unreasonable use is a question of law."

* * * * * *

"*It does not follow from these views that if upon another trial the facts are unchanged the defendant and the other salt manufacturers will be compelled to make such terms as they can, for a court of equity with its plastic powers can require as a condition of withholding a permanent injunction the construction of a reservoir on the upper sources of the stream to accumulate water when it is plentiful for use in times of scarcity and thus neutralize the diminution caused by the manufacture of salt. That court may also require, on the like condition, greater care in preventing the escape of salt water and salt substances into the stream, as the defendant attempted to do during the trial, and thus prevent or minimize the pollution.*"

It is thus evident that there are some limitations upon the issuance of injunctions in cases like the present, even in the New York Courts, which seem to grant injunctions more readily than the Courts of some other States, in cases relating to the diversion of water.

It should be observed that the conclusions of the Court in the *Strobel* case are not in harmony with the decisions of the Pennsylvania, Indiana, New Jersey and Connecticut Courts and perhaps others, which are referred to and discussed below.

SECOND POINT.

If this case were to be considered as between private individuals merely, the complainants should be left to their remedy at law, and the bill should be dismissed for want of equity, and under section 723 of the Revised Statutes.

The early practice was that a bill in chancery would not be sustained to try and settle the legal right to a water course or to enjoin the use thereof, until after the legal right had been first settled in an action at law.

Prentiss vs. *Larned*, 11 Vt., 135 (1835).
Marble and Slate Co. vs. *Adams*, 46 Vt., 496 (1874).

The distinction between law and equity in such matters has been carefully preserved by the United States statutes relating to the Federal Courts.

In the United States Revised Statutes, section 723, it is provided as follows:

> "Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law."

No doubt this section is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedy. The statute, however, shows a clear intent on the part of Congress that the remedies of equity should not be allowed to supersede the common law. One of the objects of this statute was to insure the preservation of the right to a jury trial.

> *Grether* vs. *Wright*, 75 Fed. Rep., 742.
> *In re Foley*, 76 Fed. Rep., 390.

It is to be observed that some of the State Court decisions, particularly those of New York, are not applicable as to the remedy by injunction in the Federal Courts because of the abolition of the distinctions between law and equity in pleading and practice.

The Federal statute, and the numerous decisions which might be cited thereunder, are important here, for the reason that the evidence as to actual damage is exceedingly vague and unsatisfactory, and if this injunction stands, the defendants have been deprived of a trial by jury on the question whether or not the complainants have in reality suffered any damages.

(1) A Fundamental Error in the Courts Below.

The learned Circuit Court Judge did not find any particular amount of damage, writing as follows:

> "That there will be an actual continuing pecuniary damage more than nominal in amount is manifest, but whether more or less than $2,000,

or what will be the exact amount, I did not undertake to find, because it was unnecessary."

He sustains the jurisdiction of the Court merely on the ground that an allegation in a bill in equity that the damages exceeds in amount $2,000 is sufficient to give the Court jurisdiction whether denied or not, and whether sustained by the evidence or not.

That is, the Court has held that an actual continuous damage more than nominal in amount, always justifies and even requires an injunction.

This we submit is not the law. It leaves out of account entirely many important considerations. Diversion of water is not always and under all conditions illegal even if it does result in damage to a lower proprietor.

There is no doubt that there must be some proof of damage to sustain the bill (*Gould on Waters*, sec. 206). But this alone is not enough. As was said in the *Strobel* case, from which we have quoted above, consumption by watering cattle, irrigation when not out of proportion to the size of the stream, although in fact a diversion involving some loss, are not regarded as an unlawful diversion but are allowed as a necessary incident to the use in order to effect the highest average benefit to all the riparian owners " as the enjoyment of each must be according to " his opportunity, and the upper owner has the first " chance the lower owner must submit to such loss as is " caused by reasonable use." Secondary circumstances such as the size and velocity of the stream, the usage of the country, the extent of the injury, convenience in doing business and the "*indispensable public necessities of* "*cities and villages for drainage*" and water supply should be taken into account; so that a use which under

certain circumstances is held reasonable, under different circumstances would be held unreasonable.

All those considerations are overlooked in the decisions below.

The City has acquired all the rights of the former property owners in this stream above the dam. Can it be that while they could, if necessary, use up all the water of the stream in watering their cattle, the City, their successor, could not do the same thing to furnish water to human beings?

An important error of the Court is in holding that any substantial permanent injury, even if there is no serious pecuniary damage, requires the issuance of an injunction without considering the reasonableness or unreasonableness of the amount of diversion, or that the injury to the complainants is trivial while the loss and damage to the defendant is enormous, or that there is an "indispensable public necessity" for the use of the water, or any other circumstances of great influence in a court of equity.

The City, having acquired the rights of all owners of rights to the water in the State of New York, has become itself, in effect, an owner, and entitled to such uses of the water as its predecessors had. It may well be that all of these predecessors together would have been entitled to divert all that the City diverts. A riparian proprietor has a right to the ordinary use of water flowing past his lands, including the use of the same for domestic purposes, such as drinking, washing, cooking, or for his stock. The City by succeeding to the rights of riparian owners has thus become entitled to a certain reasonable use of the water, even extending to the consuming of a reasonable quantity thereof, and it is therefore incumbent upon the complainants to show that such use of

the water is unreasonable and also results in damage to them. Questions of this sort are peculiarly within the province of a jury—certainly in a case like the present one, where the evidence is of an exceedingly vague and shadowy character, upon which a jury might well find that no damage has been suffered by the complainants.

The following is from section 206 of *Gould on Waters*.

> "In view of the varying rights of different riparian owners on the same stream, injunctions should not be granted to regulate such rights except in clear cases of intentional violation."

A good case illustrating this principle is *Earl of Sandwich* vs. *The Great Northern R. Co., L. R.*, 10 Ch. Div., 707 (1878). This is the case of a railroad company which took water from a stream for supplying its engines and for the general purposes of the station.

On a bill filed by a mill-owner lower down the stream, it appeared that the abstraction of water did no damage in wet weather and never shortened the working of the mill for more than a few minutes a day. It was held that the company, as riparian owners, were entitled to take a reasonable quantity of water for their purposes, and that the quantity taken was reasonable.

The following cases may be cited on the proposition that whether a particular use of water is reasonable or not is a question of fact for a jury:

Prentice vs. *Geiger*, 74 N. Y., 341.
Colrick vs. *Swinburne*, 105 N. Y., 503.
Strobel vs. *Kerr Salt Co.*, 164 N. Y., 303.
Bullard vs. *Saratoga Victory Mfg. Co.*, 77 N. Y., 525.
Wadsworth vs. *Tillotson*, 15 Conn., 366.

(2) THIS COURT HAD A VERY SIMILAR CASE TO DEAL WITH IN THE YEAR 1862, AND REFUSED TO ALLOW AN INJUNCTION. WE CALL PARTICULAR ATTENTION TO THIS DECISION, TO WIT:

Parker vs. *Winnipiseogee Co.*, 2 Black, 545.

This was a suit in equity to enjoin an alleged nuisance, consisting in interference with the flow of waters from a lake. The defendant corporation was attempting to secure more abundant and regular supply of water for the mills at Lowell and Lawrence, and this was to be accomplished by making the lake a vast reservoir of water, to be accumulated and maintained in wet weather, and to be drawn off and passed down the stream as it might be needed in dry weather. The defendant had bought up all the water rights relating to the lake, and all those upon the river which formed its outlet, except the plaintiff's. The company had offered him the same price that was paid to others. He refused it, seeking to extort an unreasonable and unconscionable sum. The company had spent large sums of money in improvements without any objection from the plaintiff.

The following is from the opinion:

> "We have failed to find those clear facts of right upon one side and wrong upon the other, which are necessary to quicken into activity the powers of a court of equity. We forbear to pursue this inquiry because the case presents another ground free from doubt upon which we prefer to rest our decision.
>
> "It was urged at hearing, as an insuperable objection to the relief prayed for, that the appellant has not established his right by an action at law. The objection was not taken by demurrer or in the answer. In the courts of the

United States, it is regarded as jurisdictional and may be enforced by the Court *sua sponte*, though not raised by the pleadings nor suggested by the counsel. 2 Cr., 419; 5 Pet., 496; 2 How., 383.

"The 16th section of the Judicial Act of 1789 provides 'that suits in equity shall not be sus-'tained in either of the courts of the United States 'in any case where plain, adequate and complete 'remedy can be had at law.' This is merely declaratory of the pre-existing rule, and does not apply where the remedy at law is not 'plain, 'adequate and complete'; or, in other words, where it is not 'as practical and as efficient to 'the ends of justice and to its prompt administra-'tion as the remedy in equity.' 3 Pet., 205. But where the remedy at law is of this character, the party seeking redress must pursue it. In such case, the adverse party has a constitutional right to a trial by jury. 19 How., 278. The concurrent jurisdiction of courts of equity in cases of private nuisance, dates back to an early period in the growth of the English equity system. * * * It has been greatly enlarged since the time of Lord Thurlow. * * * It is now too firmly established to be shaken, but is not without limitation. It is governed by the same principles which animate and control its action in other cases where its aid may be invoked against a wrongdoer. * * * A diminution of the value of the premises without irreparable injury is no ground for interference. * * * *Where an injunction is granted without a trial at law it is usually upon the principle of preserving the property until a trial at law can be had.* A strong *prima facie* case of right must be shown and there must have been no improper delay. The Court

will consider all the circumstances and exercise a careful discretion. * * * Until the rights of the parties are settled at law, only a temporary injunction is issued to prevent irreparable injury. * * * This jurisdiction is applied only where the right is clearly established—where no adequate compensation can be made in damages and where delay itself would be wrong. * * * The case must be one of strong and imperious necessity or the right must have been previously established at law. * * * *If the evidence be conflicting and the injury doubtful, this extraordinary remedy will be withheld. * * * After the right has been established at law a Court of Chancery will not, as of course, interpose by injunction. It will consider all the circumstances, the consequences of such action, and the real equity of the case.* * * * He (the complainant) does not allege either danger of irreparable injury, or of protracted litigation, or of a multiplicity of suits as the ground upon which he seeks relief in equity. There is no warrant for such averment. If he has been injured his injury can be ascertained and fully repaired by damages in an action of law. As a jury is the tribunal provided by law to determine the facts and to fix the amount, they can best perform this duty. The fact that other proprietors have been paid bears upon this point. 8 E. L. & E., 222–223. *The appellant can have no standing in a court of equity until he has laid this foundation for relief. This objection is fatal to the case. We decide nothing else.*

There are cases in which a court of equity will take jurisdiction and give a complete remedy without the previous intervention of a court of law. * * * But this case does not belong to that class."

Hence the decree of the Circuit Court dismissing the bill was affirmed.

Following the *Parker* case is

Consolidated Canal Co. vs. *Mesa Canal Co.*, 177 U. S., 296 (1900).

We refer to this case again under the following point.

(3) THE PROCEEDING BY INJUNCTION IS *in rem.*, AND MUST BE IN THE JURISDICTION WHERE THE INJURY IS CAUSED.

A party doing an injury in one State to a water-power running into another State may be proceeded against in a civil suit in either State in which he may be served in process, though proceedings *in rem.* by way of injunction or indictment to compel abatement can only be brought in the jurisdiction in which the nuisance exists.

6 Crim. Law Mag., 169.
Stillman vs. *Mfg. Co.*, 3 Woods & M., 538.
Foot vs. *Edwards*, 2 Blatch., 310.
Miss. & Mo. R. R. vs. *Ward*, 2 Black, 485.
Wooster vs. *Manco*, 31 Me., 246.
In re Eldred, 46 Wis., 530.
Thayer vs. *Brooks*, 17 Ohio, 489.
Armendiaz vs. *Stillman*, 54 Tex., 623.

The law of New York on this point is as follows:

An action will not lie for an injury done by the diversion of a watercourse where the premises injured are in another State. Such actions as they relate to injuries to realty are *local* actions.

Watts Administrators vs. *Kinney*, 23 Wend. 484.
S. c. *on Writ of Error*, 6 Hill, 82.
De Courcy vs. *Stewart*, 20 Hun, 561.
American Union Tel. Co. vs. *Middleton*, 80 N. Y., 408.

THIRD POINT.

Still treating this case as one between private individuals or corporations merely, it is a case for the application of the principle that a court of equity will not issue an injunction when it will inflict a greater injury than it will prevent; nor to restrain an act, the injurious consequences of which are merely trifling; but will leave the injured party to his redress in an action at law.

A recent case in this court where this principle was applied is—

Consolidated Canal Co. vs. *Mesa Canal Co.*, 177 U. S., 296 (1900).

This was a suit to restrain the defendant from maintaining in its canal a dam in such a way as to impede the flow of water in complainant's canal or to destroy a certain water-power claimed by the complainant.

A part of the finding of the Court below was as follows:

> "A further result of the erection of the water in appellant's canal below the division gates was to *very slightly, if at all,* impede the flow of water in appellant's canal above the division gates and thereby detract very slightly from the carrying capacity of appellant's canal.
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> "The cost of the reconstruction of the canal from Ayres' head gate to the division gates exceeded ten thousand dollars, and the water-power created at the fall was about equal to about forty horse-power."

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>
> "The cost of the reconstruction of the canal from Ayres' head gate to the division gates exceeded ten thousand dollars, and the water-power created at the fall was about equal to about forty horse-power."

Upon this state of facts MR. JUSTICE BREWER, speaking for this Court, said:

> "In view of the finding of the Supreme Court we need not stop to consider any question in respect to the influence of the dam placed by appellee upon the flow of water in appellant's canal, and this, notwithstanding the fact that in the trial of the case much of the testimony, pro and con, was in reference to that matter. We are concluded as to the question of fact by the finding, *and it is familiar law that injunctions will not issue to enforce a right that is doubtful, or to restrain an act the injurious consequences of which are merely trifling.*"

Atchison vs. *Peterson*, 20 Wall, 507, was also an action to restrain the diversion of running water. MR. JUSTICE FIELD said:

> "But whether upon a petition or bill asserting that his prior rights have been thus invaded, a court of equity will interfere to restrain the acts of the party complained of, will depend upon the character and extent of the injury alleged, whether it be irremediable in its nature, whether an action at law would afford adequate remedy, whether the parties are able to respond for the damages resulting from the injury, and other considerations which ordinarily govern a court of equity in the exercise of its preventive process of injunction."

The principle contended for and its application to cases like the present has been most carefully examined and weighed by the Supreme Court of Pennsylvania.

The results stated below were arrived at after elaborate argument and much difference of opinion

among the Judges, in cases affecting materially the prosperity of the State of Pennsylvania.

The doctrine of the Pennsylvania Courts may be stated as follows, in a general way:

The use and enjoyment of a running stream for domestic purposes by lower riparian proprietors must *ex necessitate* give way to the interests of the community in order to permit the development of the natural resources of the country and to make possible the prosecution of a lawful business, as for instance, that of mining coal.

An injunction should not issue but persons should be left to their remedy at law.

> "*An injunction is not of right but of grace, and will never be issued by a Court of Equity when it will inflict a greater injury than it will prevent. In such a case the injured party will be left to his redress at law.*"

The doctrine of the cases about to be cited applies *a fortiori* to the case before this Court, where vast public interests are involved, and where the injunction that has been allowed in effect forbids any State of the Union to use or authorize its own municipal corporation to use water, the most necessary thing to life next after air, if such use results in injury to a person owning lands in another State. Such person would hold in his own hands control of the resources of an entire community.

Pennsylvania Coal Co. vs. *Sanderson*, 113 Penn. St., 126 (1886), was an action on the case to recover damages for loss of a stream of water which flowed through the plaintiff's grounds and was rendered entirely useless for domestic purposes by the defendant's discharging the water into it which it pumped from its coal mines.

This was the fourth time the case had been before the Supreme Court of Pennsylvania, and the law involved was the subject of long argument and careful consideration.

A verdict for substantial damages was rendered in favor of the plaintiff, and the case came before the Supreme Court of Pennsylvania on a writ of error. This judgment was reversed. It was held that one operating a coal mine in the ordinary and usual manner, may, upon his own lands, drain or pump the water which percolates into his mine into a stream which forms the natural drainage of the basin in which the mine is situated, although the quantity of the water may thereby be increased, and its quality so affected as to render it totally unfit for domestic purposes by the lower riparian owners.

The use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners who purchased their land, built their houses and laid out their grounds before the opening of the coal mine, the acidulated waters from which renders the same entirely useless for domestic purposes must, *ex necessitate*, give way to the interests of the community in order to permit the development of the natural resources of the country and to make possible the prosecution of the lawful business of mining coal.

> "The community does not complain on any grounds. The plaintiff's grievance is for a mere personal inconvenience, and *we are of the opinion that a mere personal inconvenience, arising in this way and under such circumstances, must yield to the necessities of a great public industry*, which, although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country, *trifling inconveniences to particular persons must*

sometimes give way to the necessities of a great community."

The law as thus laid down has been frequently followed in the later cases in the Pennsylvania courts.

One of the principal ones is *Robb* vs. *Carnegie*, 145 Penn. St., 324 (1889).

This was an action in trespass on the case to recover damages for injuries to the plaintiff's land arising from the operation of certain coke ovens by the defendants.

The following is from the opinion of the Court:

> " We think it is true, as held by the judge of the court below, that the evidence in this case would not justify an injunction. It shows a selection of a site as well adapted to the business and as remote from dwellings as any in that region. To enjoin the manufacture of coke at such a site would amount to a prohibition of its manufacture and the destruction of vast allied and dependent industries of immense value to the public as well as to those directly engaged in them. *An injunction is not of right but of grace, and will never be issued by a court of equity when it will inflict a greater injury than it will prevent. In such a case the injured party will be left to his redress at law.* * * *
>
> " It is a fundamental principle of our system of government that the interest of the public is higher than that of the individual, so that when these interests are in conflict the latter must give way. If the individual is thereby deprived of his property without fault on his part, he is entitled to compensation, but if he is affected only in his tastes, his personal comfort or pleasure or preferences, these he must surrender for the comfort and preferences of the many. Thus, highways

> are necessary to the public convenience and comfort. Some noise and dust are necessarily occasioned by the legitimate use of them. This may be disagreeable—perhaps, in some cases, positively harmful—to some one or more of the persons living along them, but for this there is no remedy at law or in equity. It is one of the necessary consequences of subjecting the individual to the public in those things as to which their interests are in conflict."

As noted in the opinion, the principal distinction between the *Sanderson* case and the *Robb* case consists in this: In the *Sanderson* case the Coal Company was using its own land in the only manner practicable to it; that is the only purpose for which it was useful or valuable, to wit, the mining of coal, which could only be carried on by keeping the mines, in some manner, free from water.

In the *Robb* case, however, the injury, if any, resulted from the manufacture of coke at a particular site. This injury, if any, "is in no sense the natural and necessary consequence of the exercise of the legal right of the owner to develop the resources of his property, but is the consequence of his election to devote his land to the establishment of a particular sort of manufacturing, having no natural connection with the soil or the subjacent strata."

The *Robb* case, therefore, is the same in principle as the case at bar, *and we are asking the Court to apply the principle which was applied by the Supreme Court of Pennsylvania, to wit: that the plaintiffs should be left to their remedy in an action for damages and should not be enjoined.*

A similar question came up before the same Court in *Lentz* vs. *Carnegie*, 145 Penn. St., 612, where the rule in

the *Robb* case was adhered to and the riparian owner held entitled to damages.

In the State of Indiana a doctrine similar to that of the Pennsylvania Courts has been adopted.

Barnard vs. *Sherley*, 135 *Ind.*, 547 (1893);
s. c., 151 *Ind.*, 160.
Weston Paper Co. vs. *Pope*, 155 *Ind.*, 394.

FOURTH POINT.

This is not, however, a case of a dispute between private persons merely, but involves public questions of the highest importance. The City in building this dam and diverting the water acts in its public capacity and as an agency of the State of New York, under authority of its Legislature. Its act is therefore in its inception legal and valid.

The erection of this dam and the diversion of this water is a legal and lawful act. It is authorized by chapter 445 of the Laws of 1877 as amended. This act with its amendments is printed in full as an appendix to this brief. The title of the act as amended by Laws of 1879, chapter 516, is as follows:

> "An Act to provide a further supply of pure and wholesome water for the city of New York, and to provide for perfecting and perpetuating the right and title of the city of New York to property, water, water rights and privileges heretofore taken or used or which may be hereafter taken or used by the said city to increase the supply of pure and wholesome water for the use

of the said city, and to *provide for the payment and extinguishment of all claims or damages growing out of such taking or using.*"

It will be seen that the title is in the very broadest terms, and that the Legislature evidently intended to give to the City of New York all the power that the State of New York can give for such purposes.

In the first section the City is authorized in the manner prescribed in the act, "to acquire all rights, titles and interests in and to such real estate by whomsoever the same may be held, enjoyed or claimed, and to pay for and extinguish all claims and damages on account of such rights, titles or interests growing out of such taking or using.

It will be observed that this statute is sufficient to make the City of New York liable for damages suffered, not only to residents in or citizens of the State of New York but to any other persons.

The scheme of the act provided for the acquisition of rights, extinguishment of claims and the amount of compensation by agreement; or, if that could not be done, by the application to a Court for the appointment of Commissioners and the payment of such compensation as the Court should appoint.

If by reason of the fact that certain persons injured by the exercise of the rights conferred by this statute are residents of another State and the laws of New York cannot operate directly as an exercise of the right of eminent domain upon them, then this Court, in the exercise of its equitable powers, should aid in carrying out a necessary public work and not allow it to be defeated by technical difficulties.

As was written by Holmes, *C. J.*, in *Mulhall* vs. *Fallon*, 176 Mass., 266 (1900):

"It is true that legislative power is territorial, and that no duties can be imposed by statute upon persons who are within the limits of another State. *But rights can be offered to such persons, and if, as is usually the case, the power that governs them makes no objections, there is nothing to hinder their accepting what is offered.*"

To apply the above to the present case, the State of New York offers to the complainants full compensation in damages for any injury it has incidentally caused them in making use of its own resources for the most necessary public purposes. Will they be heard to say in a court of equity: "We decline to negotiate. We refuse to accept any sum of money whatever. We insist on our technical right to prohibit the State of New York from taking this water, no matter what its necessities?"

It appears from the testimony that all the land required in the State of New York has been acquired under this act and paid for, and that many claiming damages in Connecticut have been settled with.

It is thus established that the dam in question has been built and the diversion of water taken place under and by virtue of a statute of the State of New York, authorizing the City of New York to do the acts complained of in this case. This statute permits the exercise of the right of eminent domain in the fullest manner that the law of any State could authorize such action, and provides means by which complete and adequate compensation must be made to any person whose property rights are damaged.

We may add here that there are other somewhat similar statutes under which the City might at the beginning of this action or now exercise rights of eminent domain for securing an adequate water supply. These statutes, though not offered in evidence, are

public statutes of the State of New York, of which this Court will take judicial notice, as we understand the law.

Laws of 1883, chap. 490 (The Aqueduct Act).

Laws of 1893, chap. 189 (Sanitary Protion of the Water Supply).

Laws of 1882, chap. 410 (The Consolidation Act).

Laws of 1901, chap. 466 (The Amended Greater New York Charter).

In connection with this legislation, we refer to the two following cases:

The United States vs. *Great Falls Mfg. Co.*, 112 U. S., 645 (1884).

In this case certain property was taken by the officers or agents of the United States, pursuant to an Act of Congress, as private property for public use, in order to supply the City of Washington with water by means of an aqueduct from the Great Falls of the Potomac.

The following is from the opinion of the Court:

> "We are of the opinion that the United States having by its agents, proceeding under authority of an Act of Congress, taken the property of the claimant for public use, are under the obligation imposed by the Constitution to make compensation. The law will imply a promise to make the required compensation where property to which the Government asserts no title is taken, pursuant to an Act of Congress, as private property to be applied for public uses, such an implication being consistent with the constitutional duty of the Government, as well as with common justice. The claimants' cause of action is one that arises

out of an implied contract within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any 'contract, express or implied, with the Govern-'ment of the United States.'"

This case is authority for the proposition that the State having authorized The City of New York to acquire this property and to pay for it, an implied contract has arisen which would be enforcible in the courts, so that the plaintiffs in this case would have an action on implied contract by virtue of the Law of 1877 *against The City of New York for any damages they may have suffered by the diversion.*

Kaukauna Co. vs. *Green Bay Canal Co.*, 142 U. S., 254 (1891).

This was an action for an injunction against maintaining a certain embankment. The injunction was denied and the judgment was affirmed by the Supreme Court.

The case is authority for this proposition in general: Where the statute provides a definite and complete remedy for obtaining compensation that remedy is exclusive, but if the statutory remedy be incomplete or imperfect, the owner is not thereby debarred from his common-law remedy and may recover his damages in an action of trespass or ejectment.

FIFTH POINT.

The State government has entire control over non-navigable waters within its limits, and hence may change or abrogate the rules of the common law relating to such waters. The control of navigable waters was vested by the Federal Constitution in the general government, leaving the control of non-navigable waters in the original States, hence it follows that the State may pass such laws as to the exercise of the right of eminent domain over such waters as it pleases. This it has done in the present case, as we have seen, by passing condemnation laws authorizing the City to exercise the right of eminent domain on paying compensation. The construction, therefore, of this dam and the diversion of water were duly authorized.

By the Constitution of the United States, the control of navigable waters and to what extent interference therewith shall be allowed is vested in the Federal Government.

Even as to navigable waters, however, the control over the same by a State within its own boundaries remains in the State, so long as the action that may be taken by the State is not inconsistent with the Federal laws, and until Congress may legislate in relation thereto.

As to non-navigable waters, however, the jurisdiction and control of the same remain in the State Government as to waters within its own territory.

As to such waters, it has absolute and complete control thereof, and any action which the State may take

in reference thereto will not be interfered with by the Federal courts.

That the control of non-navigable waters remained vested in the original States has been taken for granted in all of the decisions.

There are a number of cases, however, relating to obstructions of navigable waters which throw light upon the general subject of this litigation.

In *Willson* vs. *The Black Bird Creek Marsh Co.*, 2 Pet., 245, the defendants were incorporated under a Delaware statute and empowered to hold and improve certain marsh lands, and were authorized for that purpose to make a dam across the Black Bird Marsh Creek. They did so, and the plaintiffs being the owners of a sloop, broke down the dam and the company sued them in trespass.

The following is from the opinion of CHIEF JUSTICE MARSHALL:

> "The Act of Assembly by which the plaintiffs were authorized to construct their dam shows plainly that this is one of those many creeks passing through a deep, level marsh, adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. *Measures calculated to produce these objects, provided they do not come into collision with the powers of the general Government, are undoubtedly within those which are reserved to the States.* * * *
>
> "If Congress had passed any act which bore upon the acts in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout

the lower country of the Middle and Southern States, we should feel not much difficulty in saying that a State law coming in contact with such act would be void. But Congress had passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States, a power which has not been so exercised as to affect the question. We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek can, under all the circumstances, be considered as repugnant to the power to regulate commerce in its dormant state or as being in conflict with any law passed on the subject."

See also—

Gilman vs. *Philadelphia*, 3 Wall., 713.
Miller vs. *New York*, 109 U. S., 385.
Cardwell vs. *Bridge Co.*, 113 U. S., 205.
Transportation Co. vs. *Chicago*, 99 U. S., 635.
Lake Shore and Michigan R. R. vs. *Ohio*, 165 U. S., 365.
N. Y., N. H. & H. R. R. vs. *New York*, 165 U. S., 628.
Covington Bridge Co. vs. *Kentucky*, 154 U. S., 204.
Kaukauna Water Power Co. vs. *Green Bay Co.*, 142 U. S., 254.
Willamette Iron Bridge Co. vs. *Hatch*, 125 U. S., 1.

In *Escanaba Company* vs. *Chicago*, 107 U. S., 678, it was held that non-navigable waters are left within the jurisdiction of the State, but navigable waters are under the United States control, "*but the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will*

promote the peace, comfort, convenience and prosperity of their people," etc.

It is, of course, within the power of the several States to change the common law in general within their own borders. That they may do so with regard to the common law of non-navigable streams, is settled by the decisions relative to the Western rule of "prior appropriation" of waters.

In many of the Western States and Territories it was found at an early day that the common law doctrines were wholly inapplicable to local conditions, especially where water was conveyed to a distance from a stream for use in mining operations. An entirely different rule of law therefore grew up by custom of miners in California and elsewhere, which ultimately found expression in the Statutes.

See—

Gould on Waters, § 228.
Atchison vs. *Peterson*, 20 Wall., 507,

where the subject is lucidly discussed by MR. JUSTICE FIELD.

This power is affirmed in an important decision, on which alone, we think, the decree appealed from should be reversed.

United States vs. *Rio Grande Dam Irrigation Co.*, 174 U. S., 690 (1899):

This was a bill in equity, filed by the Attorney-General of the United States, to restrain the defendant from constructing a dam across the Rio Grande river within the Territory of New Mexico, and by virtue of its laws, and from appropriating the waters of that stream for the purpose of irrigation.

The following is from the opinion of the Court:

"The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent. * * *

"While this is undoubted, and the rule obtains in those States in the Union which have simply adopted the common law, *it is also true that as to every stream within its dominion a State may change this common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise.* Whether this power to change the common law rule and permit any specific and separate appropriation of the waters of a stream belongs also to the Legislature of the Territory, we do not deem it necessary for the purposes of this case to inquire. We concede, *arguendo,* that is does.

"Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet limitations must be recognized: First, that in the absence of specific authority from Congress, a State cannot, by its legislation, destroy the right of the United States as the owner of lands bordering on the stream to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the Government property; second, that it is limited by the superior power of the general Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general Government over interstate commerce and its natural highways, vests in that Government the right to take

all needed measures to preserve the navigability of the navigable water-courses of the country, even against any State action.

"It is true there have been frequent decisions recognizing the power of the State, in the absence of Congressional legislation, to assume control of even navigable water within its limits, to the extent of creating dams, booms, bridges and other matters which operate as obstructions to navigability. The power of the State to thus legislate for the interest of its own citizens is conceded, and until, in some way, Congress asserts its superior power and the necessity of preserving the general interests of the people of all the States, it is assumed that said action, although involving temporarily an obstruction to the free navigability of a stream, is not subject to challenge. A long list of cases to this effect can be found in the reports of this Court."

This fully sustains our contention in the present case. So far as it relates to navigable waters and the jurisdiction of the United States over the same, it, of course, has no application here. But it is ample authority for the proposition that a State may change the common law rule as to running water and permit the appropriation of the same for such purposes as it deems wise, and that when it has done so such action is not subject to challenge by any one but the United States.

SIXTH POINT.

An injunction will not ordinarily issue to restrain the performance of an act which is done under authority of law.

In the present case the State of New York has authorized the City of New York to take and appropriate the waters of the Byram river, within its own boundaries, for the purpose of supplying its citizens with pure and wholesome water. The State has also provided an ample and complete method of compensating any one who may be injured by the diversion of water.

The legal remedy of the complainants is clear and ample; whatever damage they may have suffered was under authority of a sovereign State; there has been no direct taking of their property, and the injury complained of is, in substance, only the infliction of damage in respect of their complete enjoyment of their land. Under these circumstances an injunction should not issue.

Osborne vs. *Missouri Pacific Railway Co.*, 147 U. S., 248 (1892):

This was a bill in equity against the railroad company by the owner of a building on the public street in St. Louis, upon which the company was about, under competent municipal authority, to lay down tracks for use in running cars drawn by steam power. It was held that the complainant had an adequate remedy at law for the injuries complained of, and was not entitled to the injunction.

The following is from the opinion of the Court:

> "Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy where the

injury is destructive or of a continuous character or irreparable in its nature; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if indeed, relief may not be awarded *ex debito justitiae*.

"But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial and the remedy at law in fact inadequate before restraint will be laid down upon the progress of a public work. And if the case made discloses only a legal right to recover damages rather than to demand compensation, the court will decline to interfere.

"In *McElroy* vs. *Kansas City*, 21 Fed. Rep., 257, which was an application for an injunction to restrain the grading of a street in front of the complainant's lot, Mr. JUSTICE BREWER, then Circuit Judge, considered under what circumstances a chancellor could grant such relief. It was ruled that, if the injury which the complainant would sustain from the act sought to be enjoyed could be fully and easily compensated at law, while, on the other hand, the defendant would suffer great damage, and especially if the public would suffer large inconvenience, if the contemplated act were restrained, the injunction should be refused, and the complainant remitted to his action for damages."

New Haven Water Co. vs. *Wallingford*, 72 Conn., 293 (1899):

This was an action brought to restrain the Borough of Wallingford from diverting the waters of the Pine

river. The plaintiff was a private corporation engaged in supplying the City of New Haven with water, and the defendant was a municipal corporation. The following is from the opinion:

> "The plaintiff next claims that, as a riparian owner, it is entitled to the full flow of the river, and to an injunction to restrain the defendant from diverting the water, at least until it pays damages for such diversion. It is conceded that the defendant has not paid damages for diversion of the water from the plaintiff's property, and that it is liable in damages for such diversion. But the real question in this case does not relate to the right of the plaintiff as riparian owner to damages, nor to the amount of such damage, nor even to its right under certain circumstances to an injunction restraining the diversion until damages have been paid, but it relates to the very different question whether the Court erred in refusing to grant an injunction upon the facts found. The answer to this question is to be looked for in the several facts found. The plaintiff bought its property in 1897, with full knowledge of what the borough had done prior to that time in this matter, and with full knowledge of all the other appurtenant facts put upon the record. The water diverted is necessary for the uses of the borough, and to enjoin the defendant from diverting it might cause great hardship. This stream is practically the only source of additional supply open to the borough. It is found that it is doubtful whether the damage to riparian owners below the pumping station will be more than nominal; the borough has tried to settle for them, and is ready and willing, and abundantly able to pay them as soon as the amount is ascertained. Upon the facts found

upon this part of the case, the injunction was properly refused."

Harding vs. *Stamford Water Co.*, 41 Conn., 87 (1874):

In the *Harding* case a woolen mill had been established on a water-course which it used in part for power and in part for washing wool, the supply in dry season being sufficient only for the latter. Afterward a corporation, under a charter from the Legislature, purchased a tract of land four miles above on the stream, and at that point diverted a portion of the water to the Borough of Stamford for the domestic use of the inhabitants, and for manufacturing and other purposes. The charter contained a provision that the corporation should be liable to no damage by taking the water. The owners of the mill brought a petition for an injunction, pending which the corporation procured an amendment to its charter providing for compensation for property taken. The diversion of the water was no damage to the petitioners, except during the dry season.

(1) Held that the diversion was one which the respondents as riparian proprietors had no right to make.

(2) That the provision of the charter giving them the power to take the water without making compensation was unconstitutional and void.

(3) That in view of the amendment of their charter providing for compensation, the Court, in its discretion, would allow the respondents time to make compensation, and if not made that a perpetual injunction should be granted.

Platt vs. *The City of Waterbury*, 72 Conn., 531 (1900):

This was a suit to restrain the defendant from polluting the Naugatuck river, for damages and injunction,

etc. It was held that the discharge of sewage into the river was an unreasonable use of the stream and could not be acquired by prescription.

It was held that where the sewage of a city polluted a stream so as to destroy the value of plaintiff's manufacturing plant located thereon, the plaintiffs were entitled to maintain an injunction against the city to compel it to provide other means for disposing of its sewage within ample time, or to compensate plaintiffs for injuries sustained to their property. The following is from the opinion of the Court:

> "The appropriation of the river to carry such substances to the property of another is an invasion of his right of property. When done for a private purpose it is an unjustifiable wrong. *When done for a public purpose it may become justifiable, but only upon payment of compensation for the property thus taken. Public necessity may justify the taking, but cannot justify the taking without compensation.*"

Attorney-General vs. *Paterson,* 58 N. J. Eq., 1; reversed in 60 N. J. Eq., 385 (1900):

This was an information and bill of complaint filed on behalf of the owners of certain lands along the banks of the Passaic river to restrain the City of Paterson from depositing or discharging its sewage into the Passaic river and from constructing new sewers with outlets into said river.

The sewers in question were constructed by authority of the Charter of the City of Paterson and other acts of the New Jersey Legislature.

The Chancellor granted the injunction prayed for to the extent of prohibiting the discharge of sewage through

any public sewers "which do not now discharge directly or indirectly into said river."

On appeal to the Court of Errors and Appeals this decree was reversed. The Court admitted that the riparian owners above tide water had a right to prevent pollution of the stream. They admitted that ordinarily an injunction should issue to restrain such a wrong. But they refused, in view of the situation of the parties to this suit, to interfere in that manner.

We quote from the opinion as follows:

> "Ordinarily where the riparian owner is injured by an unlawful diminution of the quantity of water, or by its excessive pollution, when his legal right is established, he is entitled to the exercise of the injunction power of a court of equity.
>
> "Whether in this case the restraining order of the Court should be interposed for the protection of the riparian owners above tide-water, is the remaining question to be considered.
>
> "That question must be solved by determining whether in the situation of the parties here there is the presence of such circumstances and such equities as may justify this Court in withholding its restraining arm.
>
> "On the one hand, the riparian owner is entitled to redress in respect of the deprivation of his property.
>
> "On the other hand, the City of Paterson, at an enormous expense, has put into operation under legislative authority, and for a long series of years has used and enjoyed a system of sewerage which accommodates a population of over one hundred thousand people.

"By the restraint prayed for, this sewerage system will be suddenly destroyed, and the homes of this multitude of people will be rendered perilous to health and life, and unfit for occupancy.

"While the city cannot, upon this continued acquiescence of these riparian owners, predicate the right to deprive them of their property in the stream, yet in view of such acquiescence, and the magnitude of the injury which would fall upon the public by prohibiting the use of the sewers, it would be inequitable to enjoin if relief can otherwise be afforded. The relators are here asking equity and they must do equity.

"A substituted remedy by giving them adequate compensation for their injury would be a just disposition of the controversy.

"The granting or refusing of an injunction is a matter resting in the sound discretion of the Court. Where it would cause great injury to the defendants and might be of serious detriment to the public, without corresponding advantage to the complainant, it will not be granted. * * *

"If these complainants amend their bill, or file a new bill asking for an injunction, unless the city will consent to make such compensation for the diminution in the value of their lands as shall be ascertained to be just, such equitable relief can be given to them.

"The injunction should be vacated and the record remitted to the Court of Chancery, and the case proceeded with in accordance with the views herein expressed."

Rockport Water Co. vs. *Inhabitants of Rockport,* 161 Mass., 279:

In the *Rockport* case it was held that under a statute authorizing a town to take by purchase or otherwise the franchise or corporate property of a water company "on payment to said corporation of the actual cost of its franchise, works," etc., a payment is not a condition precedent to the taking, and the water company cannot maintain a bill in equity to enjoin the town after the taking and before payment from preventing the laying of water-pipes by the company.

SEVENTH POINT.

As to certain decisions where water rights in adjacent States were affected.

We believe it is substantially conceded by the learned counsel for the complainants that no case can be found where an injunction has issued in a situation like the present. At the risk of making this brief unduly long, but with the hope of assisting the Court, we print statements of the substance of all the important cases which seem to us to have a bearing upon this point.

In Massachusetts the difficulty seems to have been solved by allowing the person in the adjacent State injured by the diversion of waters in Massachusetts to sue in tort in the courts of Massachusetts.

It seems to be tacitly assumed that an injunction would not lie.

Bannigan vs. *City of Worcester,* 30 Fed. Rep., 392 (1887):

In this case the complainants were citizens of Rhode Island and owners of mill property on the banks of the Blackstone river, in that State.

The defendant, under a Massachustetts statute, had taken its water supply from the Tatnuck Brook, a tributary of the Blackstone river, in Massachusetts.

The plaintiffs, pursuant to the said statute, filed their petitions in the Massachusetts court, praying for the appointment of Commissioners and the amount of damages.

The plaintiff then removed the case into the United States Circuit Court for the District of Massachusetts. This case and several somewhat similar ones were before the Court on motions to remand and on demurrers to the petitions.

The following is from the opinion:

> "I am of opinion, however, that it is the duty of this Court to entertain the suit and to ascertain and enforce the rights of the plaintiffs by the proceeding which the State Law prescribed, whether it be by the usual process of law actions or by a special process prescribed for the occasion. The defendant argues that the appointment of Commissioners properly belongs to the State Court, and that a controversy removal to the Federal Court does not arise in these cases, unless there should be an appeal to a jury after the award of the Commissioners comes in. But I see no reason why this Court cannot administer relief by the appointment of Commissioners, as well as by trying the question of damages with a jury. * * *
>
> "On the demurrer the defendant alleges that the petitions show no case for relief under the statute.

The argument is that since the lands of the petitioners are in Rhode Island, and their rights in the water of Tatnuck Brook are appurtenant to those lands, the petitioners cannot claim a remedy under this statute unless it be held to have extra-territorial effect, which, of course, is inadmissible. I cannot agree with this argument. It has been held by the Supreme Court of Massachusetts that the owner of land in an adjoining State may have, as appurtenant to such land, an interest in land or water in Massachusetts, which may be protected by suit in the courts of that State (*Manville Co.* vs. *City of Worcester*, 138 Mass., 89). I am strongly inclined to the opinion that the decision in that case is of binding force on this Court in the case at bar; and, even if it be not so, I am inclined to follow that case as being of high authority, and well supported by the reasoning of the opinion."

Manniville Co. vs. *City of Worcester*, 138 Mass., 89:

This was an action of tort, for diverting the waters of a natural stream in Massachusetts, and preventing the same from coming to the plaintiff's mill in the adjoining State of Rhode Island.

It was held that such an action could be maintained in the State courts of Massachusetts.

The following is from the opinion of HOLMES, *J.*:

"The defendant's counsel contended, in the first place, that such rights as the plaintiff claims cannot extend beyond the Rhode Island line, and went the length of maintaining that a servitude cannot be created in one State in favor of lands in another. We are unable to agree to this proposition upon either principle or authority. Every decision and dictum

that we have found, bearing on the precise point, is the other way (citing cases) * * * .

"We think that the cases which recognize civil, and even criminal liability for flowing land in one State by means of a dam in another, are hardly less pertinent (citing cases). The defendant admits these cases to be law and tries to distinguish them. But we cannot assent to the distinction between discharging and withdrawing water. The consequence in one case is positive, in the other negative; but in each case it is the consequence of an act done outside the jurisdiction where the harm occurs, and the consequence is as direct in the latter case as in the former. The right infringed in the former case is called absolute ownership, in the latter, easement; *but the laws of Rhode Island, which make a man owner of a tract of land there, have no more power to diminish freedom of action in Massachusetts than any other of its laws.* A concurrence of the laws of both States is as necessary in that case as in the one at bar, to create a liability which can be enforced in either State consistently wtih principle. Such a concurrence presents no technical difficulties, and, if the substantive end to be attained is a proper one it will be recognized and acted on here, as we have no doubt it would be in Rhode Island if the position of the parties were reversed.

"Of course, the laws of Rhode Island cannot subject Massachusetts land to a servitude, and, apart from any constitutional considerations, if there are any, which we do not mean to intimate, Massachusetts might prohibit the creation of such servitude so it might authorize any acts to be done within its limits, however injurious to lands or persons outside them. But it does not do either. It has no more objection to a citizen of Rhode Island owning an ease-

ment as incident to his ownership of land in that State than it has to his owning it in gross, or to his purchasing lands here in fee. Questions might be conceived as to the transfer of such easements, but they do not arise here (Slack *vs.* Walcott, *ubi supra*). So far as their creation is concerned, the law of Massachusetts governs, whether the mode of creation be by deed or prescription, or whether the right be one which is regarded as naturally arising out of the relation between the two estates; being created, the law of Rhode Island, by permission of that of Massachusetts, lays hold of them and attaches them in such way as it seems fit to land there, Massachusetts being secured against anything contrary to its views of policy by the common traditions of the two States and by the power over its own territory which it holds in reserve."

Brickett vs. *Haverhill Aqueduct Co.*, 142 Mass., 394 (1886):

This was an action in tort for obstructing and diverting a water-course. The act of the defendant was done under authority of the statute of Massachusetts, authorizing an aqueduct corporation to take and use waters of certain ponds to supply the inhabitants of a town with water under certain conditions.

The plaintiff owned lands situated partly in Massachusetts and partly in New Hampshire, through which the stream flowed. He contended that the effect of taking the water and building the dam was to diminish the flow of water through his land, and brought this common-law action of tort for diversion of the water.

It was held that so far as the acts done were within the authority of the statute, the damages must be ascertained

in the manner provided by statute; but where the proceeding under the statute violates the provisions thereof and causes damage to the land-owner, the latter may maintain an action of tort, and it is immaterial that the lands so injured is situated in another State.

The following is from the opinion:

> "We do not deem it important that the land of the plaintiff which was injured was outside of the limits of this State. The language of the act is general, and puts all water rights upon the same footing and applies to the proprietor outside the State. Such proprietor certainly has no greater rights than the citizen whose lands or water rights within the State are injured by the acts of the defendant under authority of the Legislature. Whether the constitutional objection we have considered would be open to a citizen of another State whose lands or water rights in that State are injured we need not discuss or decide."

The following were cases cited below by the learned counsel for the complainant as sustaining his contention.

It will be evident from the summary of these cases, which we have tried to make entirely fair, that none of them pass upon the vital points of this case.

The Holyoke Water Power Co. vs. *The Connecticut River Co.*, 22 Blatch., 131 (1884); S. C. 20 Fed. Rep. 71:

The defendant was a Connecticut corporation incorporated "for the purpose of improving the boat navigation of Connecticut river," a navigable stream, and to remove certain obstructions from the channels and bars of said river, to construct dams for the purpose of entering the locks, but in such a way as not to prevent the convenient passage of boats, lumber and fish.

Under this charter the defendant built a dam in the State of Connecticut, at Enfield Falls, on the Connecticut river.

The plaintiff was incorporated under the laws of Massachusetts for the purpose of upholding and maintaining a dam across the Connecticut river above the defendant's dam and in the State of Massachusetts.

The plaintiffs claimed that the raising of the dam by the defendant would set back the water upon the plaintiff's works and diminish the effective head of its fall, and hence brought this bill for an injunction. A decree was granted against a further raising of the dam and against the constructing of a new dam to a greater height than the height occupied by the present structure.

The following is from the opinion of SHIPMAN, *J.*:

> "The defendant insists that, inasmuch as the State of Connecticut authorized the addition to the dam for the purpose of improving the navigation of Connecticut river within the limits of the State, any consequential injury not amounting to the taking of land, which is occasioned in the exercise of ordinary care by reason of such improvement, to the land of a riparian proprietor, is *damnum absque injuria;* and it may be considered as setled that, where a State, by itself or by its agents, in the construction of works authorized or directed by the Legislature of such State, for the benefit of the navigation of a navigable river within its borders, causes, without malice and in the exercise of ordinary care, a necessary consequential injury to land within its borders, no relief will be granted against such injury. The State and Federal courts concur in the assertion of this principle. * * *

"In this case the injury will be caused to property beyond the limits of Connecticut, and the question arises whether the doctrine which has been asserted is applicable to this state of facts. This question has never, so far as I can ascertain, been decided by the courts of this country. The question has arisen whether, by virtue of the right of eminent domain, one State can take, or subject to public use, land in another State, and the decisions have naturally been against such a power (Farnum *vs.* Canal Co., 1 Sumn., 46; Salisbury Mills *vs.* Forsaith, 57 N. H., 124; Wooster *vs.* Great Falls Co., 39 Me., 246; United States *vs.* Ames, 1 W. & M., 76). In two cases which have recently arisen in Federal courts, and which involved the right of a State to regulate or to improve the navigation of a river wholly within its limits, the judges have carefully limited their decisions to the facts in the cases (Escanaba Co. *vs.* Chicago, 107 U. S., 678; Huse *vs.* Glover, 15 Fed. Rep., 296). Important suggestions which bear upon the questions in this case are made by Judge Treat in Rutz *vs.* St. Louis (7 Fed. Rep., 438) and by Mr. Justice McLean, in Palmer *vs.* Commrs. of Cuyahoga Co. (3 McLean, 226).

"The rule which has been referred to is based upon the principle that the improvement of the navigation of navigable rivers within a State is a part of the State's governmental duties, and that the work which is done toward such improvement is done in the discharge of the governmental powers of the State, and that the land of the riparian proprietor within the State is subject to the just exercise of this power, and that when the State undertakes to exercise its governmental power the public good is paramount to the consequential injury to land which is incidentally and necessarily affected by the

improvement. The land is under the jurisdiction of the State and the State derives the power to inflict remote and consequential injuries upon it by virtue of such jurisdiction. The owner of land abutting upon a navigable river owns it subject to the right of the State to improve the navigation of the river, because the land is within the governmental control of the State, but it seems to me that the State obtains by virtue of its governmental powers no control over or right to injure land without its jurisdiction. Jurisdiction confers the power and the right to inflict consequential injury, but where no jurisdiction exists the right ceases to exist. It is a recognized principle that the statutes of one State in regard to real estate cannot act extra-territorially. As Connecticut has no direct jurisdiction or control over real estate situate in another State, it cannot indirectly, by virtue of its attempted improvement of its own navigable waters, control or subject to injury foreign real estate. If this resolution is a bar to an action for any consequential injury to land or to rights connected with land, in Massachusetts, Connecticut is acting extra-territorially."

It is to be observed of this case that it is entirely between private persons. No private rights were involved, nor was it proposed to give compensation to the plaintiff, nor, in fact, were there any means provided for doing so, and it might also be added that the stream was a navigable one.

The claim was that the injury could be inflicted without liability for damages.

The case is thus radically different from the one now before the Court.

Rutz and others vs. *City of St. Louis,* 7 Fed. Rep., 438 (1881):

This was an action at law for the recovery of damages in the Circuit Court for the Eastern District of Missouri. Damages were said to have been caused to the plaintiff's land in the State of Illinois, opposite the City of St. Louis, bordering on the Mississippi river, because of a dyke built on the Missouri shore unlawfully, which dyke caused the plaintiff's land to be washed away.

One of the points raised was that the action was a *local* one and hence not in the proper court.

The following is from the opinion of JUDGE TREAT:

> "And hence, if the common law rule as to *local* actions must prevail, the plaintiff is remediless, practically, however great the wrong sustained, because no legal service could be there had.
>
> "It seems that the old rule as to *local* actions should not be considered applicable to suits of this nature. Where there is a wrong, there must be a remedy. The jury in this case was caused by defendant acting within another jurisdiction.
>
> "*Second*—Defendant contends that the dyke built by it was under authority of Missouri statutes, and consequently was not unlawful, despite the averments in plaintiff's petition to the contrary.
>
> "Can such a proposition be raised by demurrer to the petition? If the United States courts are bound to take notice of public acts of every State, and the State of Missouri by statute authorized the dyke to be erected, then it was a lawful structure, intra-territorially, if properly erected, and does not fall within the rules concerning nuisances (citing cases)."

The rest of the opinion is unimportant in this connection, dealing with the question as affected by the navigability of the Mississippi river.

Farnum vs. *Blackstone Canal Corporation,* 1 Sumner, 146 (1830):

This was an action to compel the proprietors of the canal to reduce the height of a dam across the Blackstone river, which had been raised by them whereby the operations of the plaintiff's mill were impeded, and for a perpetual injunction.

In the head note of this case there is the following *quære:*

> "If the Legislature of that State can authorize a dam locally in that State to be raised so as to flow back a public river running into another State to the injury of mill privileges, locally situate in the latter State?"

In this case the questions arose between two corporations created by adjacent States, with the same name, and authorized to construct a canal in each of the States, respectively. The main question in this case was whether the acts of incorporation authorized the act which was complained of.

Here, also, it would seem to have been contended that there was no liability for damages and no means of compelling payment thereof.

U. S. vs. *Ames,* 1 Woodbury & Min., 76 (1845):

This was an action in the Circuit Court of the United States for the First Circuit, and was in trespass on the case for flowing land of the United States situated in Springfield over which jurisdiction had been ceded to them by the State of Massachusetts. The question simply was

whether the laws of Massachusetts applied as to flowage to lands that had been ceded to the United States Government. The case is of no application to the present one.

Stillman vs. *White Rock Manufacturing Co.*, 3 Woodbury & Min., 538 (1845):

This was an action for an injunction against the diversion of water. The owner was a citizen of Connecticut, and the defendant a corporation in Rhode Island. The plaintiffs owned an undivided half of certain land in Connecticut, and a mill dam over the Pawtucket river, and one-half the water-power thereof, the said river being the dividing line between Rhode Island and Connecticut. The defendants owned the eastern half of another dam 250 rods above this one, and the eastern half of this one, both being situated in the State of Rhode Island. They also owned one-half the power of the river. The defendant company made a canal from the upper dam of the easterly side of the river and diverted a portion of the waters above it around the lower dam and running then into the river below. This was used to the injury of the complainant, and hence they prayed for an injunction.

The following is from the opinion of the court:

> "If both sides of the river were situate in the same State, under the same laws, or were within the jurisdiction of the same courts, then to discriminate as to the precise extent and legality of the injury for which the action was brought would often be of little importance.
>
> "But here, unfortunately, different States and different laws in some respects govern the two sides, and different circuits of this Court possess jurisdiction on each side no less than different State Courts.

"It becomes necessary, therefore, to ascertain now what is the interest, if any, which the complainants, by owning land on the Connecticut side of the river, are entitled to in the water on the Rhode Island side; and, indeed, this becomes almost the whole gist of the controversy.

"After careful inquiry this interest seems to me to be such a corporeal easement or right as has just been described, to an individual half of the water on that side, as well as on the other side. A fence or embankment cannot be usually made in the middle of a large stream where the right to the soil terminates; and if made, it would not correspond with the true interests each owner on the banks has to some extent in all the flowing water between those banks. Hence, it is reasonable to regard these interests in the whole stream to be an undivided half, or tenancy in common, and if either side uses or takes out more than half, or at a place above removes and diverts large quantities from coming at all to the dam where the complainants are interested, their proportionate interests in the whole stream are injured, and an action of some kind or other must lie for redress somewhere. * * * Probably different forms of actions may lie as redress is sought for different views of the injury, and these different actions may be brought properly in one State or the other, as they relate more immediately to the acts done as affecting the land and mills complainants own in Connecticut, or as affecting the undivided share in the water on the Rhode side which the complainants also own. The canal here being on the Rhode Island side and first injuring the rights of the complainants there to an undivided one-half of the stream would seem to justify

whether the laws of Massachusetts applied as to flowage to lands that had been ceded to the United States Government. The case is of no application to the present one.

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"It becomes necessary, therefore, to ascertain now what is the interest, if any, which the complainants, by owning land on the Connecticut side of the river, are entitled to in the water on the Rhode Island side; and, indeed, this becomes almost the whole gist of the controversy.

"After careful inquiry this interest seems to me to be such a corporeal easement or right as has just been described, to an individual half of the water on that side, as well as on the other side. A fence or embankment cannot be usually made in the middle of a large stream where the right to the soil terminates; and if made, it would not correspond with the true interests each owner on the banks has to some extent in all the flowing water between those banks. Hence, it is reasonable to regard these interests in the whole stream to be an undivided half, or tenancy in common, and if either side uses or takes out more than half, or at a place above removes and diverts large quantities from coming at all to the dam where the complainants are interested, their proportionate interests in the whole stream are injured, and an action of some kind or other must lie for redress somewhere. * * * Probably different forms of actions may lie as redress is sought for different views of the injury, and these different actions may be brought properly in one State or the other, as they relate more immediately to the acts done as affecting the land and mills complainants own in Connecticut, or as affecting the undivided share in the water on the Rhode side which the complainants also own. The canal here being on the Rhode Island side and first injuring the rights of the complainants there to an undivided one-half of the stream would seem to justify

an appropriate remedy there for that particular wrong.

"The injury, thus far, and in this view, may be regarded as committed on interests possessed in the water beyond the centre of the stream, and not entirely on and to the mill situated upon one of the banks, or to merely that half of the stream which is contiguous. Such interests may exist in water and its use (2 N. Hampr., 259).

"The first and direct injury, then, is to the easement and consequent rights existing beyond the centre. The next consequential injury would be to the mills and land adjoining the stream before reaching the centre of the Connecticut side, and a proper remedy for that would lie there. Thus, a right-of-way on land in one State to a farm in another is an interest situated in the first State and an obstruction may be there prosecuted. * * * The chief error in the position of the respondents is in supposing that the plaintiffs have no rights whatever beyond the centre of the river or no interests to be protected there. If this be the correct view which I have adopted, then no question arises as to jurisdiction over the subject of this bill by this Court any more than as to the code of laws that must control our decision. It must be the code beyond the centre when the action is brought for a violation of the complainant's rights existing beyond the centre, and which is here the code of Rhode Island, and jurisdiction must be and properly is here for an injury done there; and hence the prosecution must be for that in the courts of Rhode Island, or if pursued in the tribunal of the general government, it must be not in the second circuit in Connecticut, but in the first circuit held in the district of

Rhode Island. Nothing can more fully illustrate the propriety of this view in the present instance than some of the incidents to the peculiar remedy by injunction which is sought here. A party is entitled to that remedy in case of great and irreparable injuries inflicted on him if done without right. Yet here this remedy must be sought in Rhode Island or it would be of no use. The canal is situated there which is made to divert the water. The owners of the canal, the supposed wrongdoers, reside there, and an injunction issued in another State or circuit could not be executed there, it being a proceeding *quasi in rem*. The injured party, then, must be deprived entirely of this legal, summary and useful species of redress unless rights and jurisdiction to protect them exist beyond the centre of the stream. * * * But the first act done in the present case was done in Rhode Island, and is proceeded against as a private nuisance erected in Rhode Island. The remedy by injunction is a specific one, or *quasi in rem*, and whether that nuisance be in fact situated in Rhode Island or Connecticut, it must be enjoined against, wherever it is, and there alone, and by the laws existing there alone it must be abated, if at all. Suppose it is proceeded against criminally, it surely may be in Rhode Island, where it is erected and does the injury. Why not, then, if prosecuted in a civil form? * * * It is no answer to all this that some injury is done by this canal to property and rights on the Connecticut side, and for which a real action could not be brought, except in Connecticut, and could not be decided except in conformity to the laws of Connecticut. The complainants in this case have not chosen to resort to such an action anywhere, much less in this State, and, on the contrary, have prayed for an injunction

against the diversion of the water on the Rhode Island side, and by an unwarranted canal used there to remove large quantities of it entirely from the dam occupied in part by the complainants, and it is manifest that this remedy for this evil must be prosecuted in Rhode Island alone, where the nuisance is situated, and where it is to be restrained, or nowhere. * * * These points settled, the whole case is settled."

Note.—The Judge would seem to hold also that the Rhode Island statute of twenty years as to prescription prevailed, and not the Connecticut statute of fifteen years; or, in other words, that the Rhode Island law was to govern and not the Connecticut law.

Note.—It will be observed that no question of public use was raised in this case, nor of eminent domain, nor of right under special State statutes, nor of compensation, the case being determined apparently upon the common law principle relating to flowing waters.

Foot vs. *Edwards*, 3 Blatchford, 310 (1855):

This was an action for damages for an injury to mill property of the plaintiffs situated in Massachusetts by the diversion of a stream of water upon which the mill stood. The act causing the diversion was committed in Connecticut. It was held that the Circuit Court of the United States for Connecticut had jurisdiction of an action by the mill-owner against the person who diverted the water in Connecticut, for damages caused by said diversion.

It would seem, from the clear and satisfactory argument of the Judge, that a suit of this nature might be brought either in the jurisdiction where the wrongful act was done or in the jurisdiction where the land injured was situated.

Crosby vs. *Hanover*, 36 N. H., 404:

This case holds that the laws of New Hampshire as to laying out highways cannot go to the extent of condemning a pier and abutment of a bridge across the Connecticut river in Vermont; but that they can permit taking the franchise and property of an interstate bridge and ferry chartered by the State of New Hampshire, and as such taking would render the pier and abutment valueless, the Court holds that this fact should be taken into consideration in making the award.

Salisbury Mills vs. *Forsaith*, 57 N. H., 124 (1876):

A Massachusetts corporation having erected a dam in Massachusetts on its own land, whereby the water of a stream was set back upon the land of a riparian owner above in the State of New Hampshire, cannot by petition have the damage of such land owner assessed, and have its rights of flowage ascertained and fixed under the New Hampshire act for the encouragement of manufacturers.

> "It is certain that this act can have no extra territorial application or effect. The use and management of Massachusetts real estate cannot be subjected to the control of New Hampshire laws. The Legislature of this State can no more confer upon a Massachusetts corporation the right to build a dam and water mill upon their land or the land of another with its consent in that State, than it can forbid such act there; and so far as I can see they might as well do either or both as to impose terms, conditions and regulations upon the building of such dam and mill as provided by the act. * * * It is one of the plainest elementary rules that no Legislature can extend its laws to territory beyond the borders of its

own State. How, then, can the courts of this State have any jurisdiction over lands and mills in another State? How shall a court in New Hampshire decree that a corporation in Massachusetts may not maintain a dam in that State above a certain height, and if such decree were made, how would the court be able to enforce it?"

See also *Wooster* vs. *Winnipiseogee Lake Co.*, 25 N. H., 525.

In the latter case it was held that the action should be brought where the land injured lies.

Wooster vs. *Great Falls Mfg. Co.*, 39 Me., 246:

This was an action in trespass on the case to recover damages for flowage of land. By a Maine statute it was provided that any man may erect and maintain a water mill and dam to raise water for working it upon and across any stream that is not navigable, upon the conditions therein named, and when such dam is lawfully erected the person sustaining damages in his lands by being overflowed may obtain compensation by complaint, and that no action shall be sustained at common law for recovery of damages for such overflowing of land, except in the manner provided.

To entitle the owners of a dam and mill to the benefits of this statute, the mill as well as the dam must be situated within the limits of this State.

And where the owner of land is damaged by its overflow, by means of a dam erected to operate a mill situated in another State across a river, the boundary of the two States, he may maintain an action for his indemnity at common law.

EIGHTH POINT.

As to what action this Court should take.

It has been already pointed out that the diligence of complainants' counsel has failed to find any direct authority for the position they are necessarily driven to assume. They rest strictly upon the precedents which have long since settled the right of private riparian owners as between themselves.

How far these precedents should be held to be binding in a case like the present, is one of the questions now before this Court.

The common law rule as to non-navigable streams had its origin in England many centuries ago. It was a country abundantly watered. It was sparsely settled. Its population was largely agricultural. No large cities, as large cities are now reckoned, then existed. The modern uses of water for the comfort, and indeed the very existence, of a crowded population were unknown.

In this country and in this age different conditions prevail. Large areas of our territory are useless unless fertilized by irrigation. Great and growing cities must cease to expand unless they can find new sources of water supply. The conditions under which the community lived when the earlier decisions were rendered, have so altered that they are now no longer applicable. It is a familiar and well-settled principle of equity that a restrictive covenant in a deed will not be enforced where conditions have so changed that the restrictions have become so obsolete, vexatious or use-

less as to render enforcement inequitable and oppressive ; but the parties will be left to their remedy at law.

Duke of Bedford vs. *British Museum*, 2 Myl. & K., 552.
Columbia College vs. *Thacher*, 87 N. Y., 311.
Jackson vs. *Stevenson*, 156 Mass., 496.

If this is justice and equity where the breach of a positive contract between parties is concerned, how much more just and equitable is it in cases like the present, where the greatest national interests are involved. The complainants appeal to an ancient rule of law, which may well be allowed to govern in ordinary cases between individuals. But in a case like the one at bar, this Court, we respectfully submit, should take a larger view. Without in the least impairing well-settled principles, it may easily lay down a general rule that will always do ample and exact justice. This Court will still advance *super antiquas vias* if it declines to grant an injunction in any case like the present, where it would be obviously oppressive and inequitable to restrain a public body, acting under the sanction of law, from using for public purposes the water which it finds in its own State, and where the injury to the plaintiffs is relatively small and is capable of full and just compensation by way of damages.

Three courses are open to this Court.

(1) This Court might reverse the decree and dismiss the bill without prejudice to any action the complainants might see fit to take in an action at law for damages or in the procedure under the Act of 1877 (see *Raton Water Works* vs. *Raton*, 174 U. S., 360).

(2) It might remand the case to the Circuit Court to take evidence of what restrictions and conditions could be placed on the use of the dam and water, so that no substantial injury could result to the complainants (see suggestions quoted on page 19 of this brief from the opinion in *Strobel* vs. *Kerr Salt Co.*, 164 N. Y., 303).

(3) It might adopt the course followed by the New York Court of Appeals in the elevated railroad cases. That is, the Court could refer the matter to a Master to take testimony as to the amount of damages, and, after the same have been ascertained, only grant an injunction if the defendants neglect to pay the same within a reasonable time. The Court might also, if the practice will allow, refer the question of damages to a jury.

The course followed in the New York State courts furnishes what, in our judgment, is the best solution of the difficulty.

Pappenheim vs. *Metropolitan Elevated Railroad*, 128 N. Y., 436 (1891):

This action was brought to perpetually enjoin the elevated railroad companies from occupying their railway in front of the plaintiff's premises, and to procure the structure already built there to be removed, and to recover from the defendants the loss and damage sustained by reason of the past operating of the railroad. It was found that the defendants were authorized by certain acts of the Legislature to exercise the right of eminent domain and thus to acquire plaintiff's easements, if necessary, and that the defendants had like authority to build the railway, but there was nothing in the acts giving the defendants any authority to take the plaintiff's property without compensation. Judgment was rendered for the plaintiff, and it was provided that *the injunction should not issue in case the defendants paid the amount of the damage to the fee upon the execution by the plaintiff of a deed conveying to them the plaintiff's interest in the easement taken by the defendants.*

The following is a summary of what was held by the Court of Appeals, so far as the same may be applicable to the present case:

It was held that the elevated railroad structure was as to the plaintiff an illegal structure and inconsistent with the use of the avenue as a public street. That at the time of building the railroad the defendants committed a trespass upon the property, which trespass had been continued from the time when the road was built up to the time of the judgment; that by continuing the trespass the defendants laid themselves open to continuous actions, in which the recovery would be for the damage sustained up to the time of the commencement of each action.

Mr. JUSTICE PECKHAM, speaking for that Court, said:

"In an action at law the owner of the property interfered with or trespassed upon cannot recover damages to his premises based upon the assumption that such trespass is to be permanent. He can recover only the damages which he has sustained up to the commencement of the action. The judgment entered for the damages sustained does not operate as a purchase of the right to continue the trespass. But the owner may resort to equity for the purpose of enjoining the continuance of the trespass, and to thus prevent a multiplicity of actions at law to recover damages; and in such an action the Court may determine the amount of damage which the owner would sustain if the trespass were permanently continued, and it may provide that, upon payment of that sum, the plaintiff shall give a deed or convey the right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon the receipt of a conveyance. The Court does not adjudge that the defendant shall pay such sum and that the plaintiff shall so convey. It provides

that, if the conveyance is made and the money paid, no injunction shall issue. If defendant refuses to pay the injunction issues. It may be that, in the case of a railroad actually running its cars upon or through property of another, it would not be justified in refusing to pay upon the delivery of the conveyance, and, instead thereof, submitting to an injunction. Public interests might have a right to be heard in that respect. But it is enough to say that, in the case where permanent damage is to be paid, there is a condition that a conveyance shall be made, and the defendant thus secures title to the property used. In cases where the owner wishes to actually stop the further trespass, and where the defendant has no legal right to acquire the property, such condition would not be inserted, and an injunction would issue upon the right of the owner being determined (Henderson *vs.* Central Railroad Co., 78 N. Y., 423).

"The plaintiff, if he receive the amount of the permanent damage, is by the Court compelled to convey the interest to the defendant, which the defendant pays for in that way. Condemnation proceedings are thus avoided. It is conclusively determined that the trespass is to be continuous, and defendant concedes it when it avails itself of the condition and pays the permanent damage in order to receive the conveyance. It is only in this way that the owner recovers as for a permanent damage to his property.

Other elevated railroad cases that may be cited are:

Hughes vs. *Metropolitan Elevated R. R. Co.*, 130 N. Y., 15.

Thompson vs. *Metropolitan Elevated R. R. Co.*, 130 N. Y., 360.

Mitchel vs. *Metropolitan Elevated R. R. Co.*, 134 N. Y., 11.

Amerman vs. *Dean*, 132 N. Y., 355, related to certain covenants in conveyances which ran with the land, restricting its use in certain respects. This action was for a permanent injunction and for damages. It was held that while a court of equity has power to enforce the performance of these covenants, the exercise of this authority is within its discretion, and where there has been such a change in the character of the neighborhood as to defeat the objects and purposes of the covenants and to render it inequitable to deprive a grantee of the privileges of conforming his property to that character, such relief will not be granted, and in lieu thereof damages may be allowed.

The trial Court refused a permanent injunction, but awarded damages and an injunction until the damages should be paid, and this judgment was affirmed by the Court of Appeals.

> "This action is in equity, and one of the objects sought is to avoid a multiplicity of actions which might be brought in case only past damages could be recovered.
>
> "*We see no reason why permanent damages may not be awarded. This right is recognized by the recent cases.*"

It is contended by Counsel for the Appellees that "our Courts of Equity have no power to withhold an injunction and to decree in lieu thereof the payment of a sum of money in the way of damages or compensation."

This assertion is made without citation of authority in its support. Certainly, as we have seen, the Courts of New York have frequently exercised the power. It is not there derived from statute, but from the inherent power of Courts of Chancery to so mould their decrees as most effectually to secure justice. They may always

adjust their decrees so as to suit the exigencies of different cases; and may vary, qualify, restrain and model the remedy so as to suit it to the controlling equities and the real and substantial rights of all the parties.

"One of the most striking and distinctive features of Courts of Equity is that they can adapt their decrees to all the varieties of circumstances which may arise, and adjust them to all the peculiar rights of all the parties in interest."

1 Story Eq., Jurisp, 21.

The New York practice has been followed in New Jersey and Massachusetts, and probably in other States.

Attorney General vs. *Paterson*, 60 N. J. Eq., 385.
Jackson vs. *Stevenson*, 156 Mass., 496.

TENTH POINT.

It follows from these considerations that the decree of the Court below allowing a perpetual injunction was erroneous and should be reversed upon such terms and conditions and with such instructions as to this Court may seem proper.

Dated New York, February 15, 1902.

GEORGE L. RIVES,
Corporation Counsel.

GEORGE L. STERLING,
Of Counsel.

APPENDIX.

Laws of 1877, Chapter 445.

An Act to provide for perfecting and perpetuating the right and title of the city of New York to property, water, water rights and privileges heretofore taken or used, or which may be hereafter taken or used, by said city, to increase the supply of pure and wholesome water for the use of said city, and to provide for the payment and extinguishment of all claims or damages growing out of such taking or using.

Passed June 15, 1877, three-fifths being present.

[The title of this act was amended by chapter 516 of the Laws of 1879 so as to make it read as follows :]

An Act to provide a further supply of pure and wholesome water for the city of New York, and to provide for perfecting and perpetuating the right and title of the city of New York to property, water, water rights and privileges, heretofore taken or used, or which may be hereafter taken or used, by said city, to increase the supply of pure and wholesome water for the use of said city, and to provide for the payment and extinguishment of all claims or damages growing out of such taking or using.

The People of the State of New York, represented in Senate and Assembly do enact as follows:

uisition and for aining er sup- by Com- sioner ublic rks.

Section 1. In all cases where the commissioner of public works of the city of New York shall have heretofore entered upon, taken or used, or shall hereafter enter upon, take or use, or shall deem it necessary to enter upon take or use the waters of any lake, or any

upland, or land under water, or water rights or privileges, or any incorporeal hereditaments, or any other property, for the purpose of maintaining, preserving or increasing the supply of pure and wholesome water for the use of said city, the said commissioner is authorized, for and in behalf, and in the name of the mayor, aldermen and commonalty of the city of New York, in the manner hereinafter prescribed, to acquire all rights, titles and interests in and to such real estate, by whomsoever the same may be held, enjoyed or claimed, and to pay for and extinguish all claims or damages on account of such rights, titles or interests, or growing out of such taking or using.

Commissioner, etc., authorized to enter upon lands, etc.

Sec. 2. The said commissioner, his engineers, surveyors and such other persons as may be necessary to enable him to perform his duties under this act are hereby authorized to enter upon any land or water for the purpose of making surveys or examinations, and to agree with the owners, occupants or claimants of any real estate which may have been required or damaged, or which hereafter may be required or damaged, in carrying into effect the provisions of this act, as to the amount of compensation to be paid to such owners, occupants or claimants, and the time and manner of such payment. And in any case such real estate shall be owned, occupied or enjoyed by the people of this state, or by any county, town or school district within this state; such rights, titles, interests or properties may be paid for upon agreement respectively with the commissioners of the land office, who shall act for the people of this state, with a chairman and a majority in numbers of the board of supervisors of any county who shall act for such county and with the supervisor and commissioners of highways in any town who shall act for such town, and with the trustees of any school district that shall act for such district.

Damages, settlement of.

Proceedings in case parties cannot agree.

Sec. 3. In case the said commissioner of public works is unable to agree with the said owner or owners, occupant or occupants, claimant or claimants, of any such real estate, or with any or either of such officers as to the sum or sums to be paid for the acquisition or extinguishment of any such real estate, or of any right, title or interest thereto or therein, for carrying into effect the purposes of this act, the said commissioner of public works shall have the right to acquire such real estate, or to extinguish any such right, title or interest thereto or therein, for the mayor aldermen and commonalty of the city of New York in the manner and by the special proceedings hereinafter provided.

Petition for appointment of Commissioners.

Sec. 4. For the purpose of acquiring such real estate or of extinguishing any right, title, interest thereto or therein, and the said commissioner of public works, for and in behalf of the said mayor, aldermen and commonalty of the city of New York may present a petition praying for the appointment of commissioners of appraisal to the supreme court, at any general or special term thereof, held in the district in which the real estate described in the petition may be situated, such petition shall be signed and verified according to the practice of such court. It must contain a general description of the real estate which the said commissioner seeks to acquire, and of the rights, titles and interests therein which he seeks to extinguish, and also a general statement of the names and places of residence of the parties, as far as the same can by reasonable diligence be ascertained, who own, occupy or enjoy, or who claim to own, occupy and enjoy, any such real estate, or any right, title or interest therein, and if any of such persons are infants, their ages, as near as may be, must be stated; and if any such persons are idiots, or persons of unsound mind, or are unknown, that fact must be stated, together with such other allegations

and statements of liens or incumbrances upon such rights, titles and interests as the said commissioner may see fit to make. A copy of such petition, with a notice of the time and place the same will be presented to the Supreme Court, must be served on all persons whose interests are to be affected by the proceedings at least ten days prior to the presentation of the same to the said Court.

Notice. Service of

1. If the person on whom such service is to be made resides in this State and is not an infant, idiot, or person of unsound mind, service of a copy of such petition and notice must be made on him, or his agent or attorney, authorized to contract for the sale or surrender of the real estate described in the petition, personally, or by leaving the same at the usual place of residence of the person on whom such service must be made as aforesaid with some person of suitable age.

Non-residents.

2. If the person on whom such service is to be made resides out of the State, and has an agent residing in this State, authorized to contract for the sale or surrender of the property described in the petition, such service may be made on such agent, or on such person, personally, out of the State, or it may be made by publishing the notice, stating briefly the object of the application and giving a description of the property to be taken or effected, in the state paper, and in a paper printed in the county in which the real estate taken or effected is situated, once in each week for one month next previous to the presentation of the petition; and if the residence of such persons residing out of this State, but in any of the United States, or any of the British colonies in North America, is known, or can by reasonable diligence be ascertained, the said commissioner must, in addition to such publication as aforesaid, deposit a copy of the petition and notice in the post-office, properly folded and directed to such person at the post-office nearest the place of res-

idence at least two weeks before presenting such petition to the court, and pay the postage chargeable thereon in the United States.

nors. 3. If any person on whom such service is to be made is under the age of twenty-one years, and resides in this state, such service shall be made as aforesaid on his general guardian, or if he has no such guardian, then on such infant, personally, if he is over the age of fourteen years, and if under that age, then on the person who has the care of such infant, or with whom such infant resides.

iots, etc. 4. If the person on whom such service is to be made is an idiot, or of unsound mind, and resides in this State, such service may be made on the committee of his person or estate, or if he has no such committee, then on the person who has the care or charge of such idiot or person of unsound mind.

nknown wners. 5. If the person on whom such service is to be made is unknown, or his residence is unknown and cannot by reasonable diligence be ascertained, then such service may be made under the direction of the court by publishing a notice, stating the time and place the petition will be presented, the object thereof, with a general description of the property to be affected by the proceedings, in the state paper, and in a paper printed in the county where the property is situated, once in each week for two weeks previous to the presentation of such petition.

fant, etc., ithout uardian. 6. In case any party to be affected by the proceedings is an infant, idiot or person of unsound mind, and has no general guardian or committee, the court shall appoint a special guardian or committee to attend to the interests of such person in the proceedings; but if a general guardian or committee has been appointed for such person in this state, it shall be the duty of such general guardian or committee to attend to the interests of such infant, idiot or per-

son of unsound mind, and all notices required to be served in the progress of the proceedings, may be served on such general or special guardian or committee.

Corporations. Municipalities, etc.

7. In case the people of this state, or any county of this state, or any town in this state, or any common school district within this state, or any corporation organized under the laws of this state, shall own, occupy or enjoy any real estate which is to be acquired or affected in carrying into effect the purposes of this act such notice and petition may be served in the manner hereinbefore prescribed, upon the following officers respectively: upon the clerk to the commissioners of the land office, in behalf of the people of the state; upon the clerk of the board of supervisors of any county, in behalf of such county; and upon the supervisor of any town, and the commissioners of highways in any town, in behalf of such town; upon the trustees of any school district, in behalf of such district; and upon the acting chief executive officer of any corporation, in behalf of such corporation.

8. In all cases not herein otherwise provided for, service of orders, notices and other papers in the special proceedings authorized by this act, may be made as the supreme court shall direct.

Real estate may be acquired.

9. Whenever there shall be one or more of the estates enumerated in article one of title two of chapter one of the second part of the Revised Statutes, entitled "Of the creation and division of estates," in any real estate, as the term real estate is defined in this act, required by the city of New York for the purpose of this act, such estate and real estate may be acquired by said city by means of the special proceedings authorized by this act.

Proceedings to acquire same.

In every such case the commissioner of public works, in addition to the statements now required by the said act shall set forth and state in his petition the facts, so

far as the same can with reasonable diligence be ascertained, in relation to any such estate, and the person, persons, or class of persons then in being or not in being, who are or may become entitled in any contingency to any estate as aforesaid in such real estate, and may pray that such estate may be acquired and such persons may be bound by the said proceedings; and thereupon the court to whom such petition is presented, if there be no attorney appearing in their behalf, shall appoint some competent and disinterested attorney or officer of the court to appear in such proceedings and represent the rights, interests and estate of the person, persons, or class of persons aforesaid in such real estate, and to protect the same on the appraisal and proceedings aforesaid; and it shall be the duty of the court, on or after the confirmation of the report of appraisal, to ascertain by such report or by a reference for that purpose or otherwise, in its discretion, the rights, interest and estate of such person, persons or class of persons, in the real estate so appraised and in the compensation awarded therefor, and to make an order determining the amount of share of such compensation to which such person, persons or class of persons are or may become entitled on account of such estate, as the same shall arise or become vested in them respectively, and to direct and to provide for the payment, investment or securing thereof, for the benefit of the person, persons or class of persons aforesaid, who are or who may, in the contingency upon which such estate arises, become entitled thereto; upon the payment or deposit by the comptroller of the city of New York of the sums to be paid for the acquisition of such real estate in the manner provided in section eight of this act, and in the manner directed by order of Court the said commissioner of public works, for and in behalf of the said the mayor, aldermen and commonalty of the city of New York, shall be entitled to enter upon, take possession of and use the said real estate for the

purposes indicated in this act, and such person, persons or class of persons as are or may become entitled to such estate shall be barred of and from all right or claim in and to such land adverse to its use and occupation by the said commissioner or by the said the mayor, aldermen and commonalty.

To apply to all proceedings not completed.

Sec. 2. This act shall take effect immediately, and the provisions hereof shall apply to all special proceedings heretofore brought under chapter four hundred and forty-five of the laws of eighteen hundred and seventy-seven, and the various acts amendatory thereof, and which shall not be completed at the date of the passage of this act.]

The part (subd. 9) within brackets added by chapter 582 of the Laws of 1881.

Appointment of commissioners.

Sec. 5. On presenting such petition to the supreme court as aforesaid, with proof of service of a copy thereof and notice as aforesaid, all or any of the parties whose estates or interests are to be affected by the proceedings may show cause against granting the prayer of the petition, and may disprove any of the facts alleged in it. The court shall hear the proofs and allegations of the parties, and, if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders who reside in the county (or some adjoining county) where the property to be appraised is situated, commissioners to ascertain and appraise the compensation to be made to the parties interested in the real estate proposed to be taken or affected or theretofore taken or affected in such county for the purposes indicated in this act, and to fix the time and place for the first meeting of the commissioners.

Powers and duties of commissioners.

Sec. 6. The said commissioners shall take and subscribe the oath prescribed by the twelfth article of the constitution. Any one of them may issue subpœnas and administer oaths to witnesses, and any such witness sworn and examined and testifying falsely shall be deemed guilty of perjury, and shall be liable to the pains and penalties imposed by law for that offense. Such subpœnas may be served within this State by any person and must be served by any sheriff or constable when thereunto required; in case of the failure or refusal of any witness so subpœnaed to obey such subpœna, or to answer any question or to produce any books or papers when thereunto required by a majority of the said commissioners, the commissioners, or a majority of them, shall report such failure or refusal to a justice of the supreme court in the said judicial district in which such commissioners were appointed, before whom the same proceeding shall thereupon be had, as though such failure or refusal were that of a witness duly subpœnaed to appear and testify upon the trial of an action before such justice, and such justice shall in all respects proceed as though such subpœna had issued out of the court in which he presides; a majority of such commissioners may adjourn the proceedings before them, from time to time, in their discretion. Whenever they meet, except by appointment of the court, or pursuant to adjournment, they shall cause reasonable notice to be given to the parties interested, or their agent or attorney. They shall view the property described in the petition, and hear the proofs and allegations of the parties, and reduce the testimony taken by them, if any, to writing, and after the testimony in each case is closed, they, or a majority of them, all having an opportunity to be present, shall, without any unnecessary delay, and before proceeding to the examination of any other claim, ascertain and determine the compensation which ought justly to be

made by the said mayor, aldermen and commonalty of the city of New York to the owners or the persons interested in the rights, titles and privileges to be acquired or affected by the said proceeding. They, or a majority of them, shall also determine what sum ought to be paid to the general or special guardian or committee of an infant, idiot, or person of unsound mind, or to an attorney appointed by the court to attend to the interests of any unknown owner or party in interest, not personally served with notice of the proceedings and who has not appeared, for costs, expenses and counsel fees. They, or a majority of them, shall also (but not in excess of any request therefor made in behalf of the city) determine the height to which the waters of any lake or natural stream, concerning which such proceedings are instituted, may be raised, and the point to which such waters may be drawn down by the said, the mayor, aldermen and commonalty of the city of New York, such determination to be made before any award of damage shall be made on account of such proposed raising or depressing of such waters. The said commissioners shall make a report of their proceedings to the supreme court, with the minutes of the testimony taken by them, if any; and they shall be entitled to the payments hereinafter provided for their services and expenses, to be paid from the fund hereinafter provided.

Report.

Confirmation of.

Sec. 7. On such report being made by said commissioners, the counsel to the corporation of the city of New York shall give notice to the parties, or their attorneys, to be effected * by the proceedings, according to the rules and practice of said court at a general or special term thereof for the confirmation of such report, and the court shall thereupon confirm such report, and shall make an order containing a recital of the substance of the pro-

* So in the original.

ceedings in the matter of the appraisal and a general description of the real estate appraised, for which compensation is to be made; and shall also direct to whom the money is to be paid, or in what bank and in what manner it shall be deposited by the comptroller of the city of New York.

To be recorded.

Sec. 8. A certified copy of the order so to be made as aforesaid shall be recorded, at full length, in the office of the clerk of the county in which the real estate described in it is situated, and thereupon, and on the payment or deposit by the comptroller of the city of New York of the sums to be paid as compensation for the acquisition of such real estate, or for the extinguishment of any right, title or interest therein, and for the costs, expenses and counsel fees as directed by said order, the said commissioner of public works, for and in behalf of the said mayor, aldermen and commonalty, shall be entitled to enter upon, take possession and use the said real estate for the purposes indicated in this act and all parties mentioned in this act who shall have been made parties to the proceedings, together with all parties claiming or to claim, by, through or under them, shall be forever divested and barred of all right, estate and interest in such real estate, and of all claim for any damage on account of the taking, using or affecting of such real estate, or of any right, title, interest therein. All real estate acquired by the said mayor, aldermen or commonalty of the city of New York, under and pursuant to the provisions of this act, shall be deemed to be acquired for public use. Within twenty days after the confirmation of the report of the commissioners, as provided for in the seventh section of this act, either party may appeal, by notice, in writing, to the other, to the supreme court from the appraisal and report of the commissioners. Such appeal shall be heard by the supreme court at any general or special term thereof on due notice thereof being given according to the rules and prac-

Appeal.

tice of said court. On the hearing of such appeal, the court may direct a new appraisal and determination of any question passed upon before the same or new commissioners in its discretion, but from any determination of the general term, either party, if aggrieved, may take an appeal, which shall be heard and determined by the court of appeals. In case of a new appraisal, the second report shall be final and conclusive on all the parties interested. If the amount of compensation to be made by the said city is increased by the second report, the difference shall be a lien on the real estate appraised and shall be paid by the comptroller of the city of New York to the parties entitled to the same, or shall be deposited in bank as the court may direct, and if the amount is diminished, the difference shall be refunded to the said the mayor, aldermen and commonalty of the city of New York by the party to whom the same may have been paid, and judgment therefor may be rendered by the court, on the filing of the second report, against the party liable to pay the same. Such appeal shall not affect the possession by the city of New York of the real estate appraised; and when the same is made by others than the said city it shall not be heard except on the stipulation of the party appealing not to disturb such possession.

Adverse and conflicting claims to money, determination of.

Sec. 9. If there are adverse and conflicting claimants to the money, or any part of it to be paid as compensation for the real estate taken or affected, the court may direct the money to be paid into the said court by the said comptroller, and may determine who is entitled to the same and direct to whom the same shall be paid, and may, in its discretion, order a reference to ascertain the facts on which such determination and order are to be made.

Interest of unknown parties, how protected.

Defects or informalities may be corrected.

Sec. 10. The court shall appoint some competent person to appear for and protect the rights of any party in interest who is unknown, or whose residence is unknown, and who has not appeared in the proceeding by an attorney

or agent. The Court shall also have power, at any time, to amend any defect or informality in any of the special proceedings authorized by this act as may be necessary, or to cause new parties to be added and to direct such further notices to be given to any party in interest as it deems proper, and also to appoint other commissioners in place of any who shall die or refuse or neglect to serve or be incapable of serving.

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Sec. 11. If, at any time, after an attempt to acquire title by appraisal of damages or otherwise, it shall be found that the title thereby attempted to be acquired is defected, the said city may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made, and at any stage of such new proceedings the court may authorize the said city, if in possession, to continue in possession, and if not in possession, to take possession and use such real estate during the pendency and until the final conclusion of such new proceedings, and may stay all actions and proceedings against the said city on account thereof on the comptroller of said city paying into court such sum as the court may direct, to pay the compensation therefore when finally ascertained, and in every such case, the party intrusted in such real estate may conduct the proceedings to a conclusion if the said city delays or omits to prosecute the same. And if, at any time, the said city shall require, for the purpose indicated in this act, to acquire any additional real estate, or to extinguish any other or further rights, titles, interested therein in addition to that which it has already acquired or extinguished, such city may acquire such additional real estate or extinguish such additional rights, titles, interests therein, or any such real estate, or any right, title or interest therein, which it now uses or occupies, or which it has heretofore used or occupied, by purchasing the same of the persons or parties owning the same, or interested therein, or

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affected by such proceedings, and by paying to such parties such damage as they may sustain by reason thereof if the amount of such compensation or damages can be agreed upon between such commissioner of public works and such persons or parties; and if such commissioner of public works shall, for any cause, be unable to agree for the purchase of such real estate, or shall be unable to agree upon the sum which shall be paid to such persons or parties in satisfaction of the damages they may sustain, or if the title to any such real estate or rights already acquired or extinguished, or attempted to be acquired or extinguished, shall, for any cause, prove defective or imperfect, then and in every such case such commissioner of public works may proceed to acquire and perfect title to such real estate or rights, and to ascertain and appraise such damages in the manner and by the proceedings hereinbefore in this act prescribed.

Commissioners of land office, powers of.

Sec. 12. The commissioners of the land office shall have power to grant to the said city any real estate belonging to the people of this state which may be required for the purposes indicated in this act, on such terms as may be agreed on between them and the said commissioner of public works, always, however, reserving and maintaining the rights of the people and riparian owners to go to the water at any point to which the same may be drawn; and if any real estate of any county, town or school district is required by such city for the purposes of this act, the majority of the board of supervisors acting for such county, or the supervisor of any such town, with the commissioners of highways therein acting for such town, or the trustees of any school district acting for such district, may grant or surrender such real estate for such compensation as may be agreed upon between such officers, respectively, and the said commissioner of public works.

Supervisors, etc.

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Sec. 13. In case any real estate required by said city for the purposes of this act shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, idiot or person of unsound mind, the supreme court shall have power by a summary proceeding, on petition, to authorize and empower such trustee or general guardian or committee of such infant, idiot or person of unsound mind, to sell, convey or surrender the same to the said city on such terms as may be just; and in case any such infant, idiot or person of unsound mind has no general guardian or committee, the court may appoint a special guardian or committee for the purpose of making such sale, surrender or conveyance, and may require such security from such general or special guardian or committee as said court may deem proper. But before any conveyance or release authorized by this section shall be executed, the terms on which the same is to be executed shall be reported to the court on oath, and if the court is satisfied that such terms are just to the party interested in such rights, titles, interests or property, the court shall confirm the report and direct the proper conveyance or release to be executed, which shall have the same effect as if executed by an owner of such rights, titles, interests or property having legal power to sell, surrender and convey the same.

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Sec. 14. In all cases where the commissioner of public works shall have heretofore entered upon, taken or used, any real estate, either with or without the license of the owner thereof, for the purpose of increasing the supply of water for the city of New York, and the title to such real estate shall not have been acquired by said city either by purchase or by any proceedings under any existing law and the said city, by any of its officers, agents or employees, shall be in

possession thereof at the time this act shall take effect, and such possession shall be continued for the period of sixty days thereafter, such possession shall be deemed an election on the part of said city to take such real estate under and pursuant to the provisions of this act, and in that case it shall be the duty of the corporation counsel, at the expiration of said sixty days, to make the necessary application for the appointment of commissioners pursuant to the provisions of this act to appraise the dameges and compensation to be paid for the taking and using of the same. The performance of such duty may be enforced by the supreme court by mandamus on the application of any owner or claimant of the real estate so taken or used, and upon the hearing before the commissioners appointed upon such application they shall, if requested by said owners or claimants, also appraise and determine the amount of damages sustained by said owners or claimants respectively by reason of any use or occupation of the said real estate by said city, or any of its officers or agents, before the taking of such application. The said commissioners shall in their report state the amount of damages so ascertained and determined by them, and the amount thereof shall form a part of the amount required to be paid by said city before the right and title to the real estate specified in said report shall be vested in said city as hereinbefore provided. Upon such hearing all of the provisions of this act in relation to compelling the attendance of witnesses, and the examination thereof, shall apply to the claim for damages growing out of such use and occupation.

Right of action

SEC. 15. As to any damages which may have accrued to the owner or claimant of any real estate, as to which the proceedings provided by this act may be instituted, before such proceedings shall have been instituted, this act shall not be taken or construed to deprive any party of a right to a trial by jury of the question of such dam-

age, and the said commissioners shall estimate and determine such damages, and the compensation to be made therefor, only upon the consent of all the parties thereto. Such consent, however, shall be conclusively presumed as against any party who shall appear and take part in the proceedings to determine the amount of such damage, without first entering an objection to the determination* thereof by such commissioners. In absence of such objection, but not otherwise, the said commissioners shall proceed to final determination of such question.

Term "real estate" defined.

SEC. 16. The term real estate, as used in this act, shall be construed to signify and embrace all uplands, lands under water, the waters of any lake, pond or stream, all water rights or privileges, and any and all easements and incorporeal hereditaments, and every estate, interest and right, legal and equitable, in lands or water, including terms for years, and liens thereon by way of judgment, mortgage, or otherwise, and also all claims for damage to such real estate.

Compensation of commissioners, clerks, surveyors, etc., employment of. Comptroller to pay.

Waste of water, prevention of.

Proviso.

SEC. 17. The commissioners appointed in pursuance of this act shall receive as compensation the sum of ten dollars per day for each day actually employed. They may employ the necessary clerks and surveyors. The salaries of the commissioners and of their employees, and the necessary traveling expenses and all other expenses incurred in and about such special proceeding shall be paid by the comptroller of the city of New York. Such salaries and expenses shall not be paid, however, until they have been taxed by a justice of the supreme court in the second judicial district, upon five days' notice to the counsel to the corporation. The said commissioners of appraisal shall recommend to the court such sums as in their judgment are proper costs and disbursements, in-

* So in the original.

cluding fees paid expert witnesses and allowances for counsel, such allowances for counsel not to exceed five per centum of the amount allowed for the acquisition of the real estate (*as amended by Laws of* 1897, *chapter* 713).

Sec. 18. For the purpose of preventing any waste of water, the commissioner of public works of the city of New York is hereby authorized to construct such aqueducts, reservoirs, dams, sluices, canals and appurtenances as may be necessary to collect or retain the water in or from any lakes or streams which may be taken under the operation of this act, and use such waters as the wants and necessities of said city may require. Provided that nothing contained in this or in any existing act shall authorize or permit any water in excess of the ordinary flow thereof to be drawn from Lake Mahopac and Lake Gleneida, in the town of Carmel, and county of Putnam, between the first day of March and the first day of September in any year. And provided also that nothing in this or in any existing act contained shall be so construed as to interfere with any existing right to catch fish, obtain ice, or keep, use and maintain boats in or upon any natural lake or pond which may be acquired under this act; nor shall it be so construed as to destroy any existing right of riparian owners upon such lakes and ponds to use the waters thereof, or to build upon the shores thereof, except as such rights may be affected by the raising or lowering of the waters of such lake or ponds, as hereinbefore prescribed. Proviso.

Sec. 19. It shall be the duty of the comptroller of the city of New York, and he is hereby authorized and directed, on requisition of the commissioner of public works of the city of New York, to raise, from time to time, on bonds of said city, amounts of money sufficient to pay the sums which may be necessary, from time to time, to be Expenditures, etc., payment of.

paid for the acquisition of any real estate, or for the extinguishment of any right, title, interest therein, to be acquired or extinguished under this act, together with all expenses necessarily incurred in surveying, locating and acquiring title to real estate, or extinguishing claims for damages thereto; and also such sums as, from time to time, may be found necessary for the construction of aqueducts,* reservoirs, dams, sluices, canals and appurtenances as are now in process of construction; and all such payments shall be made by the comptroller on the certificate of the commissioner of public works of the city of New York; provided, however, the amount so raised shall not, in any one year, exceed the limitations which, by law, may be or may have been imposed as to the amount of expenditure to be made by the commissioner of public works.

Proviso.

Title of bonds.

Interest.

When redeemable

Payment provided for.

Execution of bonds.

Disposition

Sec. 20. The bonds so to be issued by the comptroller of the city of New York, in pursuance of this act, shall be entitled "additional Croton water stock of the city of New York," shall bear interest at the rate of not exceeding seven per cent. per annum, and shall be redeemable in not less than ten nor more than fifty years, as the said comptroller shall determine to be for the best interest of the said city; and the board of aldermen of the city of New York is hereby authorized and directed to raise, from time to time, by tax upon the estates, real and personal, subject to taxation in the city and county of New York, the sum or sums of moneys which may be required to pay the interest on said bonds and to redeem them at maturity. The mayor and comptroller of said city are hereby authorized and directed to sign said bonds, and it shall be the duty of the clerk of the board of aldermen to countersign the same and to affix thereto the seal of the city. Such bonds shall not be disposed of at less than the par value thereof.

* So in the original.

Amendment of pleadings, etc.

Sec. 21. The said city of New York is hereby required to repair and forever maintain the highways built or in process of construction by the said city around the new reservoir, on the middle branch of the Croton river, in the town of South East.

Acts inconsistent repealed.

Sec. 22. All actions for the recovery of real property, or of any real estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real estate, brought under the provisions of this act, shall be brought and tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in cases provided by statute.

Highways, repair of.

Sec. 23. If in any particular it shall at any time be found necessary to amend any pleading, proceeding, process or action, or to supply any defect therein, arising in the course of any special proceeding authorized by this act, the same may be amended or supplied in such manner as shall be directed by the supreme court, which is hereby authorized to make such amendment or correction.

Actions, places of trial of.

Sec. 24. All acts and parts of acts inconsistent with this act are hereby repealed, provided that nothing herein contained shall at any time be understood, held or construed to repeal any part of chapter fifty-six of the laws of eighteen hundred and seventy-one, entitled "An act to provide a further supply of pure and wholesome water for the city of New York," passed February twenty-seventh, eighteen hundred and seventy-one, excepting the fourth section thereof, which is hereby repealed, nor to repeal the act amendatory of said act, passed April sixth, eighteen hundred and seventy-one, being chapter three hundred and twenty-eight of the laws of eighteen hundred and seventy-one (*as amended by laws of* 1879, *chapter* 516).

Sec. 25. This act shall take effect immediately.

In the Supreme Court of the United States.

October Term, 1901.

No. 491.

The City of New York and Bird S. Coler, as Comptroller thereof,
Appellants.

against

Samuel Pine and Frederick Muller.
Appellees.

Memorandum by the Corporation Counsel of the City of New York in reply to the additional brief submitted by counsel for the appellees.

Counsel for the appellees having been permitted by the Court to submit an additional brief, counsel for the appellants submits the following in reply:

The supplemental brief for the appellees is in substance a mere restatement of a part of their original brief and of their oral argument. Their contention is that the property of the complainants in the flow of the Byram river is prop-

erty "inseparably attached to and a constituent element of their freeholds in Connecticut," and is indeed "real estate in Connecticut." Quoting *Scriver* vs. *Smith*, 100 N. Y., 479, they assert that "while the right has some semblance of an easement it is not, in fact, a real easement, but a corporeal right."

The cases cited by the learned counsel for the appellees are, we believe, all cited upon their original brief, and all but two of them are cited and commented upon in the brief heretofore filed by the appellants. It does not seem necessary at this stage of the case to renew a discussion of their meaning and effect.

We respectfully submit that the technical form of the right which the complainants may possess in the flow of the Byram river cannot be decisive of the present appeal. Whether that right be defined as an easement or as a corporeal right, the fact remains that the physical *thing* taken by the State of New York, namely the water, is within its own jurisdiction. The *right* of which the complainants are thereby deprived is no doubt a right in the nature of property; but only in a remote and metaphorical sense can it be said that the State of New York by any acts which it has committed or authorized within its own jurisdiction has invaded the State of Connecticut.

The physical acts by which the complainants allege they were deprived of their property were, it is conceded, committed upon the soil of the State of New York. It is true that the consequences of these acts to the complainants, whatever such consequences may have been, were felt in the State of Connecticut; but we insist that in no proper sense of the word can it be said that the State of New York has actually taken property situated in another State.

Whether the plaintiff's right in the flow of this stream ought in strictness to be called an incorporeal or a corporeal hereditament, it is certain that, under the decisions, such flow is liable to be lawfully diminished to some extent by the use of the upper owners along the stream. As has been well said by the Court of Appeals of the State of New York in *Strobel* vs. *Kerr Salt Company*, 164 N. Y., 303:

> "As the enjoyment of each must be according to his opportunity, and the upper owner has the first chance, the lower owners must submit to such loss as is caused by *reasonable use*. * * * The question of reasonable use is generally a question of fact."

We recapitulate our argument as follows:

A. The State of New York may lawfully divert and use any waters found within its limits.

B. Even if the Court is not prepared to adopt so broad a proposition as this, yet it should allow the State of New York *reasonable use;* and under the circumstances of the present case, the use we make is reasonable.

C. In any event, it is inequitable to grant a writ of injunction in a case like the present; and we suggest that the following general rule might well be laid down, viz.:

Where it would be obviously oppressive and inequitable to restrain a public body, acting under the sanction of law, and using for public purposes, the water which it finds in its own State, and where the injury to lower riparian owners in another State is relatively small and

is capable of full and just compensation in money, a writ of injunction should not issue unless the payment of money compensation is refused.

Dated March 13, 1902.

GEORGE L. RIVES,
Corporation Counsel.

IN THE

Supreme Court of the United States.

THE CITY OF NEW YORK and BIRD S. COLER, as Comptroller thereof,
Petitioners,

AGAINST

SAMUEL PINE and FREDERICK MULLER,
Respondents.

Brief for Respondents in opposition to Petition for Writ of Certiorari.

Statement.

This is an application by the petitioners for a writ of *certiorari* to review a decree of the United States Circuit Court of Appeals for the Second Circuit, affirming the decree rendered by the United States Circuit Court for the Southern District of New York in the suit of Samuel Pine and Frederick Muller, complainants, against the Mayor, Aldermen and Commonalty of the City of New York, defendants, perpetually enjoining the City of New York from diverting the waters of the west branch of Byram River or a part thereof from its natural channel into its reservoirs. The petition shows that the City of New York is a municipal corporation of the State of New York, and is the corporate successor of the said defendant.

The respondents are owners of land lying within the State of Connecticut and are citizens of the State of Connecticut. The west branch of the Byram River rises in the State of New York and traversing that State for a few miles crosses the boundary line between it and the State of Connecticut and after traversing that State empties into Long Island Sound. It is a non-navigable river. After crossing the boundary line it unites with the east branch and forms the Byram River. The Byram River then runs along and intersects the lands of the respondents. The City of New York constructed a dam on the west branch of the said Byram River, in the State of New York, a few hundred feet from the said boundary line, which dam it uses to divert the water of the said river from the water shed of the Byram River, carrying it many miles away to the City of New York, where it is used for municipal purposes. and thereby is wholly lost to the river and the lands of the respondents.

It would seem that no question exists between the parties to the action as to the facts. They are substantially admitted by the answer of the defendant (see Record, fol. 16). The testimony of the City's chief engineer, introduced on behalf of the respondents, is to the effect that the diversion is one-third of the flow of the stream through or over the lands of the respondents (fols. 23, 175, etc.). The City conceded that the respondents were damaged, denying only that they were damaged in the sum of twenty-four hundred dollars and more (see Answer, Record, fol. 23), and the city pleaded its ability and willingness to pay damages (fol. 24).

The case came on for trial in the United States Circuit Court for the Southern District of New York. Decision was rendered in favor of the respondents, and on July 28, 1900, a decree granting them their permanent injunction was filed (See Record, fol. 832). The opinion of the learned Justice of the Circuit Court will be found at folio 814

of the record. The City appealed to the United States Circuit Court of Appeals for the Second Circuit. The case was argued in that Court in March, 1901, and on the 30th day of October, 1901, the Court handed down its decision, affirming the decision of the Court below, Mr. Justice Wallace and Mr. Justice Thomas concurring. Mr. Justice Wheeler dissented. The opinion of the Court and the dissenting opinion of Mr. Justice Wheeler will be found in the record, pages 221 and 233.

POINTS.

I.

The writ of certiorari should not be granted. The City voluntarily relinquished its right of appeal to this Court, and cannot now secure a hearing by writ of certiorari.

The City by its answer and by its acceptance of the issues raised by the bill of the respondents voluntarily united in framing this as a case non-appealable to this Court. The City having thus voluntarily surrendered all right of appeal to this Court at the commencement of the action and having been defeated cannot now have a writ of *certiorari* thereby indirectly securing an appeal the right to which it long ago relinquished.

The bill of the respondents alleges the different citizenship of the parties. This is the only direct allegation of jurisdiction in the bill and by it and through it the United States Circuit Court acquired jurisdiction (Record, fol. 2). Mr. Justice

Wheeler in his dissenting opinion points out this fact (Record, p. 233). He says: "The plaintiffs " have come into this Court because they were citi- " zens of another State and not because the land " through which they derive their rights to the " water taken is situated in another State."

Where the jurisdiction of the United States Circuit Court attaches only because of allegations of diverse citizenship there is no appeal to this Court.

Act March 3, 1891, C. 517, 26 Stat., (U. S.), 826.

Even though constitutional questions may inhere in the case or may develop in its progress, no right of appeal to this Court exists or can arise if it appear from the pleadings that jurisdiction is sought on the ground of citizenship alone.

Borgmeyer, Admr., *v.* Idler, 159 U. S., 408.

Col. Cent. Mining Co. *v.* Turck, 150 U. S., 138.

The respondents might have *pleaded* constitutional grounds; they might have raised by direct allegation the question of the taking of private property without the process of law; and likewise the City, instead of accepting the grounds of jurisdiction pleaded by the respondents, and thereby cutting off the right of appeal to this Court might and should have raised in its answer by direct allegation the constitutional question if it conceived of its case as resting on constitutional grounds. It could have pleaded the Statute of the State of New York, under which it assumes to act, and thereby could have expressly framed, in its answer, a constitutional question drawing to the case the appellate jurisdiction of this Court.

BUT THE ANSWER OF THE CITY IS SILENT IN RESPECT TO EVERY SUCH QUESTION. THE STATUTE OF NEW YORK IS NOT PLEADED. FOR ALL THAT AP-

PEARS, THE ACT OF THE CITY OF NEW YORK IN CONSTRUCTING ITS DAM IS IN VIRTUE OF NO SPECIAL RIGHT AND UNDER NO SPECIAL POWER OR AUTHORITY.

Therefore, the City, in its acceptance of the issues framed by the bill and by the form and very substance of its own pleading, waived every ground upon which it could invoke as of right the appellate jurisdiction of this Court.

What the respondents have alleged in their bill and what the City has conceded in its answer, the admissions and waivers of the respective pleadings are a contract between the parties. The rights which they have created in each other by their admissions and waivers are vested rights, and this Court will not divest either party of such rights.

Knox *v.* Morer, 72 Iowa, 154.
McEachern *v.* Kirchner, 90 N. C., 177.
Stump *v.* Long, 84 N. C., 616.

To grant the writ of *certiorari* in this case would be nothing more than to revest in the City a right which it surrendered to the respondents and which the respondents tacitly accepted when the parties first appeared in court. This Court will not strip the respondents of a right which the City has by its own act vested in them. It has been the constant effort of Congress and the Federal courts by statute, rule and decision to confine the hearing of appeals by this Court to certain special cases. Congress has gone far in express enactment and the courts have formulated rules of the strictest character to prevent a defeated litigant from obtaining by grace through a writ of *certiorari* what was denied him of right.

Act March 3, 1891, C. 517, 26 Stat. (U. S)., 826.
Forsyth *v.* Hammond, 166 U. S., 506.
Col. C. C. M. Co. *v.* Turck, *supra.*
Borgmeyer *v.* Idler, *supra.*

In the light of these authorities can this Court grant the writ in a case where, had the City *pleaded* the facts it now alleges and which were as well known when it pleaded as they are now, it could have established its *right* of appeal to this Court?

Counsel for the respondents submit that for this Court to grant the petition in this case will establish a precedent whereby a writ of *certiorari* will become the moral right of every defeated litigant who, by his pleading or his practice, has lost his "*right* of appeal." Thereby, the benefits of the statute of 1891 will be largely lost and the plain purpose of Congress set at nought.

II.

The writ of certiorari should not be granted because the grounds recognized by this Court as necessary to sustain the granting of the writ do not exist.

This Court has said in Forsyth *vs.* Hammond, 166 U. S., 506, that its power of *certiorari* "will be "sparingly exercised, and only when the circum-"stances of the case satify us that the importance "of the question involved, the necessity of avoiding "conflict between two or more courts of appeal, "or between courts of appeal and the courts of a "State, or some matter affecting the interests of "this nation in its internal or external relations, "demand such exercise."

In the case at bar there is no conflict between two or more courts of appeal or between United States courts of appeal and the courts of a State. The simple question presented in this case is whether a person or corporation by an act done in one State

can lawfully divert an interstate unnavigable water course from the freeholds of citizens in the adjoining State. The question is one of property law. No claim is made by the City that the law of the State of New York and the law of the State of Connecticut, or the decisions of the courts of those two States, differ in respect to the right of a riparian owner to have a stream flow as by nature it was wont to flow. The decisions of the two States uniformly hold that the right of a riparian owner is not a mere easement, but is property *per se*, and that when it is taken by an act or diversion the remedy is by injunction in equity.

Gardner *vs.* Village of Newburgh, 2d Johnson's Chancery, 162.

Corning *vs.* Troy Iron and Nail Factory, 40 N. Y., 204.

Gilzinger *vs.* Saugerties Water Company, 66 Hun, 173; affd., 142 N. Y., 633.

Amsterdam Knitting Company *vs.* Dean, 162 N. Y., 278.

Stroebel *vs.* Kerr Salt Co., 164 N. Y., 303.

Garvey *vs.* Long Island R. R. Co., 159 N. Y., 332.

Lake *vs.* Horn, 45 Conn., 409.

Mason *vs.* Hoyle, 56 Conn., 255.

Harding *vs.* Stamford Water Co., 41 Conn., 87.

Enfield *vs.* Connecticut River Co., 7th Conn., 28, p. 50.

Parker *vs.* Griswold, 17 Conn., 207.

Water Commissioners *vs.* Perry, 69 Conn., 468.

Gould on Water Courses, 2d Ed., Sec. 204, Sec. 366.

Black's Pomeroy on Water Rights, Sec. 9.

Angell on Water Courses, 7th Ed., Sec. 8, Sec. 389, Sec. 394.

As there is no conflict between two State courts of appeal, so there is no conflict between the United States Courts and the Courts of a State or between United States Courts in the different Circuits. The Circuit Court of the United States for the Circuit embracing Connecticut and New York has adopted and applied the same principles of law as are expressed in the New York and Connecticut cases cited above (see Holyoke Water Power Company *vs.* Connecticut River Company, 22 Blatch., 131).

More than all this, the history of the law generally, touching the point at issue presents an unbroken line of authorities in support of the views expressed above in favor of the respondents. They are stated below:

1845. United States *vs.* Ames, 1 Wood & Min., page 76, Opinion by Mr. Justice Woodbury.

1855. Opinion of Honorable Thomas E. Franklin, Attorney-General of Pennsylvania, rendered upon the request of Gov. Pollock, 54 Am. Law Register, page 385.

1881. Rutz *vs.* The City of St. Louis, 7 Fed. Rep., page 438. Opinion of Mr. Justice Treat.

1884. Holyoke Water Power Co. *vs.* Connecticut River Co., 52 Conn., 570. Opinion of Mr. Justice Nathaniel Shipman (U. S. Circuit Court).

1894. Opinion of Messrs. George B. French and Jeremiah Smith* of the New Hampshire Bar, rendered upon the proposed appropriation by the City of Boston of the waters of the Nashua River, an interstate river as regards Massachusetts and New Hampshire (see Harvard Law Review, Vol. 8, p. 138).

In harmony with this array of authorities covering a century of our jurisprudence, the learned trial Justice in the case at bar rendered his decision in favor of the complainants. That decision the Appellate Court has affirmed. The dissenting opinion of Mr. Justice Wheeler cites only two authorities.

* Mr. Smith is an ex-justice of the Supreme Court of New Hampshire, and one of the faculty of the Harvard Law School.

The decision of this Court in Head *vs.* Amoskeag Company, 113 U. S., page 9, and Brickett *vs.* Haverhill Aqueduct Co., 142 Mass., page 394. The first case named, however, was not the case of an interstate river, and can have no application to the case at bar. The case of Brickett *vs.* Haverhill Aqueduct Co. is considered, and its lack of application to the case at bar thoroughly exhibited in the opinion of the Court of Appeals.

III.

The petition should be denied.

MARSHALL, MORAN & WILLIAMS,
Solicitors for Respondents.

CHARLES C. MARSHALL,
STEPHEN G. WILLIAMS,
Of Counsel.

December, 1901.

ADDENDUM: Counsel for respondents pray leave to suggest to the Court that they are informed that the case of The State of Kansas *vs.* The State of Colorado is set down for argument in this Court February twenty-fourth, 1902. That case arises on a bill in equity by a State for an injunction against a State to prevent the diversion of an interstate stream alleged to be navigable. It is said to present questions arising under legislation, both State and Federal, in derogation of the common law of riparian property. The case in which this petition is presented, as already shown, arises on a bill in equity by private citizens of one State against a corporation of another State for the diversion of an inter-

state stream admitted to be non-navigable. The property questions it presents are limited to the common law of riparian property. We beg to submit that the narrower scope of the latter case in respect to parties, as well as in respect to issues, make desirable its hearing and decision prior to or coincident with the case of Kansas *v.* Colorado.

It is, therefore, respectfully suggested that this Court, if it grant the writ of *certiorari* in this case, should advance this case to hearing prior to or at the same time with the case of Kansas *v.* Colorado.

Our understanding is that counsel for the petitioners acquiesce in the suggestion that this case be so advanced.

CHARLES C. MARSHALL,
STEPHEN G. WILLIAMS,
Of Counsel.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 491.

SAMUEL PINE AND FREDERICK MULLER,
Appellees,

AGAINST

THE CITY OF NEW YORK AND BIRD S. COLER, as Comptroller thereof,
Appellants.

BRIEF FOR APPELLEES.

Statement.

This case and the record therein have been brought before this Court by virtue of its writ of *certiorari*, issued upon the petition of the appellants above named, January 8, 1902, to the Judges of the United States Circuit Court of Appeals for the Second Circuit. The suit was brought in the Circuit Court of the United States for the Southern District of New York in Equity, for an injunction restraining the Mayor, Aldermen and Commonalty of the City of New York, a municipal corporation of the State of

New York, from building a certain dam in the State of New York, on the west branch of the Byram River, and from maintaining the same and from diverting the waters thereof. The said municipal corporation, pending the suit, became by legislative enactment the City of New York. The controversy in the case turns on the right of the City, under certain statutes of eminent domain enacted by the Legislature of the State of New York, to divert, for the purposes of its municipal water supply, by a dam erected in the State of New York, near the boundary line, between that State and Connecticut, the west branch of the Byram River, a non-navigable, interstate stream, rising in the State of New York and traversing the territory of that State and of the State of Connecticut.

The testimony having been taken in the usual manner before one of the examiners of the Court, the case came on to be heard at a term of the United States Circuit Court for the Southern District of New York, and was argued before the Honorable Nathaniel D. Shipman, whose opinion thereon was rendered in favor of the complainants (the appelles here) (see Record, p. 204). The decree of the Circuit Court was entered thereon, granting the injunction prayed for in the bill, all the parties consenting as to the form of said decree (see Record, p. 209). Said decree was filed July 28, 1900. The defendant appealed to the United States Circuit Court of Appeals for the Second Circuit and the appeal was argued at the October term of said Court, 1900, and by the decision of that Court, rendered October 30, 1901, the decree of the Court below was affirmed (see Record, p. 221). Mr. Justice Wheeler filed a dissenting opinion (see Record, p. 233).

The complainants are the owners of separate freeholds in the State of Connecticut through which or along which the Byram River flows. Said river is a non-navigable stream and is made up of two branches, the aforesaid west branch and the east

branch. The east branch rises in and flows wholly in the State of Connecticut. The west branch rises in the State of New York and flows southeasterly into the State of Connecticut. The east and west branches flow together in the State of Connecticut on the farm of the complainant Muller, about four miles distant southeasterly from the boundary line between Connecticut and New York. At their point of union on Muller's farm they form the Byram River, which flows thence southeasterly through Muller's farm. About a mile below Muller's farm, it strikes the farm of the complainant Pine and flows along this farm, the middle line of the channel forming the easterly boundary thereof (fol. 33), and thence onward to Long Island Sound.

At a point about seven hundred feet north of the boundary line between the two States (fol. 9), and within the State of New York, the City of New York began the construction of a dam across the said west branch of the Byram River to divert the waters thereof from their natural channel to the City of New York. Long before said dam was near completion, and in March, 1896, this suit was commenced.

The answer admitted the allegation of the bill that the City was in 1896, at the time the bill was filed, building the dam which it avers was not then near completion (fol. 16).

It admitted that when completed the City intended by it to divert all the water of said west branch.

The language is, "It admits that it intends to "divert some or all of the water of said west "branch from its natural channel" (fol. 17).

It admitted that the complainants were injured and damaged. Its language is, "The *diversion of* "*water of said branch would cause but little if any* "*injury and damage to the complainants or either* "*of them*" (fol. 17),

It admitted complainants were damaged, denying only that they were damaged as much as $2,400 and more in each case (fol. 18).

It admitted that complainants were damaged by pleading its willingness to pay damages (fol. 19).

Nothing was set up by way of affirmative defense in the answer, and nothing was denied that was alleged in the bill except—

That the damage was as great as alleged therein.

The city did not plead the statutes of New York, authorizing it to condemn land and property for the purpose of its water supply, under which statutes it presumes to justify. It read in evidence, however, Chapter 445, Laws of New York, 1877 (fol. 5 A and fol. 138). This and certain statutes amendatory and supplementary on which the City relies are set forth at length in the City's brief (p. 86).

From the answer it would seem that the only issue raised by the City was the amount or extent of damage. If the complainants are right in their claim (and it is their claim) that this question of the amount or extent of their damages does not affect their right to their injunction, they are entitled to their decree (see Points *infra*, and cases there cited) without proof of pecuniary damage.

Much testimony, however, has been taken touching the point of the amount or extent of the injury which bears on the amount of the damage. Indeed, substantially all the testimony relates to the point of injury and damage. With a view to facilitating such examination of the testimony as the Court may desire to make, the following matters are suggested:

> NOTE.—In fols. 67–119, pp. 23 to 39 of the printed pleadings and proofs, will be found minutes of a conference between Mr. Williams, one of the solicitors for the complainants, and Gen. Charles H. T. Collis, then Commissioner of Public Works, and George W. Birdsall, Chief Engineer of the Croton Aqueduct, also certain letters by General Collis and Eugene E. McLean, an engineer in the employ of the Comptroller to

the then Comptroller, Hon. Ashbel P. Fitch. These minutes and letters appear to have been submitted by solicitors for complainants. As testimony the minutes would seem to be incompetent and open to the objection made by the defendant's counsel (fol. 115). At any rate they show nothing more than attempted negotiations between some of the Connecticut riparian owners and the City of New York. At folio 76 will be found a stipulation between Mr. Williams and General Collis that any statement made by Mr. Williams at the interview covered by the said minutes should not be used against his clients, the owners, in the event of litigation. The negotiations evidenced by the minutes seem to have come to nothing, for the trial of this cause, which was at issue at the time of the conference, has proceeded.

The letters of General Collis and of Mr. McLean, the Comptroller's engineer (fols. 95, 98 and 100), are, it is submitted, competent evidence of the views and opinions of those eminent officials in respect to the claim of the complainants and the injury inflcted upon them, even though those letters may not bind the City of New York as claimed in the objection of defendant's counsel (fol. 118).

The chief witness called on behalf of complainants was George W. Birdsall, Esq., Chief Engineer of the Croton Aqueduct of the City of New York. It is submitted that the utmost credibility should be given to this witness as a distinguished official of the defendant and obviously a witness not in sympathy with the complainants.

The current of the Byram River and the west branch thereof have long been utilized for manufacturing purposes. Mills at Portchester, at Glen-

ville, the mills of Reynolds, of Wilcox, of Birdsall, Ward & Company, Tingue, House & Company, are all referred to in the testimony. Much of the land along the valleys is, however, occupied by farms. The complainants are the owners, respectively, of two of these farms. The farm of the complainant Muller is intersected by the west branch of the Byram River, and by the east branch and by the main stream, which the two branches unite to form on his property. His farm embraces forty-five acres of land (fol. 356). He owns on each side of the river, *i. e.*, the west branch and the main stream, 1,145 feet, or altogether on both sides 2,290 feet. His farm is used exclusively for farm purposes, and the streams are used for domestic purposes, and for the watering of his stock (fol. 356). His farm is valued by the witnesses for the city at $6,600 (fol. 515). The farm of the complainant Pine is located on the main Byram River about a mile below the junction of the east and west branches on the farm of Muller. It embraces about one hundred acres (fol. 391), and extends along the west side of the river 3,725 feet ((fol. 33). It is in general cultivation (fol. 392), and the complainant Pine maintains upon it about thirteen head of horses and cattle. This farm has on it deposits of feldspar, and, in addition to his farming, the complainant Pine carries on the manufacturing of feldspar (fol. 34). He opened the feldspar quarry about five years ago and constructed his mill, which is operated by steam generated from water drawn from the Byram River. His manufacturing business is profitable (fol. 342). Much of his farm consists of pasture lots which are laid out along the river. There are no springs upon the farm of the complainant Pine, and no other water excepting a swamp and a well (fols. 345, 346).

The west branch of the Byram River is fed by two ponds or lakes lying in Westchester County, New York, to wit, Wampus Lake and Byram Lake, whose outlets unite some distance north of the Con-

necticut State line to form said west branch (fol. 130). Wampus Lake has an area of 20 acres (fol. 133), Byram Lake of 120 acres (fol. 135).

The City has built a dam across the west branch of the Byram River in New York near the Connecticut State line, the purpose of which is to divert and carry off all the water of said west branch (fols. 136, 137, 547). The dam can divert at least 8,000,000 gallons per day (fol. 139). Before this dam was built by the City of New York, all this water flowed through or by the lands of the complainants in the natural channels of the west branch and the main Byram River, except so much as was lost by absorption (fol. 140). The dam in dispute has been constructed at an expense of $45,000 (fol. 141). The east branch of the Byram River has not been affected, but it is the least valuable of the two branches. It is not fed by lakes (fol. 133). It flows through a rough narrow valley with very little low ground (fol. 377). Its current in the summer has been known to flow through an auger hole one and one-half inches in diameter (fols. 378, 379). It has been known to be almost entirely dry, just a little water percolating through the bed (fol. 174).

The west branch had the qualities of a valuable stream. In addition to being fed by lakes its flow in the first and longer part of its course is through swampy lands (fol. 378). The swamps lie up above the City dam (fol. 239).

It is in evidence that swamp lands along the course of a stream tend to make the flow more uniform, not only contributing water, but holding the water like a sponge and letting it off gradually down the bed of the stream, and thereby equalizing the flow, especially through the dry seasons (fols. 305-306, 433).

It is therefore submitted in behalf of complainants that of the two tributaries of the main Byram River, by far the most valuable in respect to volume, uniformity and quality of water, is the west branch, which the City at the State line has wholly cut off,

diverted and appropriated. Even that part of the west branch lying below the City dam, which is left to feed the Byram River, has, according to undisputed testimony, a course through dry territory, void of marsh lands and tributary streams (fols. 377, 382, 242). The flow of the lakes, the storage of the swamps and their equalizing influence have all been cut off and lost to the west branch by the construction of the defendant's dam near the State line.

The destruction of the west branch as a tributary of the Byram River being both admitted and proven, the attention of the Court is asked to the effect upon the Byram River.

The testimony of Mr. Birdsall is clear that the average flow down the Byram River prior to the diversion was 24,000,000 *gallons per day* (fols. 1A-17A, 42-54, 120-170), *and that the diversion by the City is* 8,000,000 *gallons per day, or one-third of the flow of the entire main stream.* These facts are substantially proven by the City's own witness, Fred. K. Betts, assistant engineer.

This testimony of Mr. Birdsall, the City's own chief engineer, is not disputed by the defendant nor is any attempt made to disprove it. The only witness called by the City in reply to Mr. Birdsall is Mr. Frederick K. Betts, an assistant engineer (fols. 398–434).

Mr. Birdsall, for the complainants, testifies in substance:	Mr. Betts, for the defendant, testifies in substance:
That the drainage area of the west branch above the City dam is 8.66 sq. m. (fol. 7A).	
The drainage area between the State line and the junction of the east and west branch is about 4 sq. m. (fol. 4, &c.), making a total	The drainage area diverted by the City is 8.66 sq. m. (fol. 407).

drainage area of west branch about 12 sq. m. That the water flow on the west branch, and generally in the neighborhood of Byram River and its branches is an average of 1,000,000 gallons per day for each square mile of drainage area, making the flow of the west branch at its junction with the east branch 12,000,000 gallons per day (fol. 122).

That the drainage area of the east branch is between 7 and 12 sq. m. (fols. 47, 126, 127). (It follows that its average flow at its junction would be from 7,000,000 to 12,000,000 gallons per day.) That the total maximum average flow of the main Byram River at the junction of its two branches is 24,000,000 gallons per day, to wit, 1,000,000 gallons per day for each of the 24 sq. m. of drainage area. The diversion by the City dam being 7,660,000 gallons per day, the decrease in the flow of the west branch of the Byram River just above the junction is in the proportion of 7,660,000

That the drainage area of the main Byram River and its branches *north of the land of the complainant Pine and exclusive of the drainage area diverted by the City* is 18.22 sq. m. (fols. 417, 418). As this witness also estimates the daily average flow at 1,000,000 gallons (fol. 428–429) the total maximum flow of the Byram River and its branches at the land of Mr. Pine before the diversion by the City would be 18,220,000 plus 8,660,000 gallons, equals 26,880,000 ~~28,000,000~~ gallons per day.

gallons to 12,000,000, or about 2-3 (fol. 124). Just below the junction the decrease in the flow of the main stream would be "*more than* ½" (so Mr. Birdsall expresses it. Obviously it is as much as ½).

The difference between Mr. Birdsall's figures, 24,000,000, and Mr. Betts' figures, 26,880,000, is accounted for by the fact that Mr. Birdsall computes the flow at the junction of the east and west branch, and Mr. Betts computes the flow at a point on Mr. Pine's land a little further down the river, and obviously embracing a greater drainage area.

It is therefore clear that by the defendant's own testimony, the flow of the main Byram River by the land of Mr. Pine is decreased on an average 7,000,000 to 8,000,000 gallons out of an estimated total of 26,880,000 gallons per day, or between ¼ and ⅓.

But it must be considered that Mr. Betts allows as large a drainage flow for the drainage area between the junction and Mr. Pine's land as is allowed by him and Mr. Birdsall above the junction, to wit, 1,000,000 gallons per day per square mile of drainage area. This is obviously improper and unjust to the complainants, for they prove by undisputed testimony, as already shown, that the *lower part* of the west branch, *all the east branch and the main river between Mr. Pine's and the junction flow through a comparatively dry territory devoid of swamp lands and contributory streams or springs.* The copious, constant and equal flow belonged to the west branch above the State line because of the lakes and the swamp lands there, and this flow the City has wholly diverted.

The west branch at a point immediately below the dam is dry. The entire current has been seized and

diverted by the City, and the City makes no claim to the contrary, but admits that it will take all the water.

Fols. 236, 237, 238, 255, 256, 349, 350, 351–352 (see Answer, fol. 17).

The practical effect of this destruction of the west branch upon the current of the main stream is testified to by complainant's witnesses, and their testimony is undisputed.

The witness Knapp, who was reared on the banks of the east branch (fol. 174), and who has lived most of his life in the immediate neighborhood of the Byram River (fols. 196, 197 and 198), testifies that before the diversion and in the summer season the main Byram River had a sufficient flow to cover its bed of twenty-five feet in width (fol. 177). In the winter season the current ran about two feet deep (fol. 177). The condition of the bed of the Byram River along the property of Mr. Pine, after the diversion by the City, is clearly shown in the photograph, Complainants' Exhibit 1, October 26, 1899 (fol. 359). At folios 343, 344, the witness Johnson testifies to the condition of the main stream as nearly dry at times in the past two years (that is since the date of the diversion, 1896) (fol. 407).

The City admits that it has paid damages to many of the riparian owners along the Byram River in Connecticut, but that these were all mill owners (fol. 168). It admits that it paid damages to the mill owner, Reynolds, adjoining Mr. Pine, and whose mill prior to the diversion by the City was operated by the mill pond which abuts on Mr. Pine's land and is formed by a dam on the Byram River, near the southerly line of Mr. Pine's land (fol. 373). (See fols. 361–374).

It is alleged in the complainant's bill (fol. 5) that valuable mill sites and other valuable rights and privileges are owned by the complainants on said Byram River. This allegation is not denied by the

answer (fol. 18), but it is there alleged that the mill sites are of little, if any, value. No testimony was introduced on this point by the defendant. The complainants put on the stand one Lawrence B. Jenckes, Superintendent of Public Works for the City of Stamford, and a civil engineer, whose competency as such was admitted by the defendant (see fol. 261). Mr. Jenckes' testimony (embraced in fols. 260-338 and fols. 387-388), is to the effect that if the complainant Pine could secure the right to flood the adjoining lands, to wit, the lands opposite his ownership on the Byram River, he could, by damming the said river, create a pond with sufficient water to develop 33 horse-power, provided the water diverted by the City is restored. At folio 387 complainants' counsel read in evidence the statutes known as the Flowage Acts of Connecticut, to wit, Chapter 26, Public Acts of Connecticut, 1863 and 1864, approved July 6, 1864; also General Statutes 1875, Chapters 472-473-474; General Statutes of Connecticut, 1880, Chapter 92; General Statutes of Connecticut 1875, Chapter 234, Section 18; General Statutes of Connecticut, approved 1887, in force 1888, Sections 1216-1225 and Section 2687. At folios 361-374, the witness Johnson testifies as to the size of the pond abutting on Mr. Pine's land near his southerly boundary owned by one Reynolds, which, prior to the diversion by the City, furnished water to operate the neighboring mill of Reynolds. This testimony taken in connection with the Flowage Act of Connecticut and the testimony of the witness Jenckes is submitted as proving the feasibility of constructing a mill pond on the land of Mr. Pine capable of developing a 33 horse-power provided the present diversion by the City is enjoined.

In addition to the witness Betts, whose testimony has been considered above, the only material witnesses produced by the defendant were the witnesses Banks, Hoyt and Austin. The apparent object of the testimony of these witnesses is to contra-

dict in part the testimony of the witness Knapp for the complainants. The witness Knapp, as a real estate expert and as a resident of the neighborhood, testified to a value of some $15,000 for the farm of the complainant Pine (fol. 182), and that the damage to Mr. Pine by reduction of the flow of the Byram River caused by the diversion by the City was 30 per cent. of the said value of $15,000 (see fol. 202, fol. 196, fol. 218). The witness Knapp admitted that he had not, in reaching his estimate of value and of damage, taken into account the manufacturing industry, to wit, manufacturing feldspar, carried on by the defendant Pine on his farm (fol. 195), and had not considered the availability of Mr. Pine's property for a mill site, nor the utilization of the natural flow of water through it for manufacturing purposes (fol. 213). To meet this testimony the City introduced the testimony of Messrs. Banks, Hoyt and Austin. Mr. Banks testified to the value of Mr. Pine's farm as $10,000 (fol. 444), and the value of Mr. Muller's farm as from $5,000 to $6,000 (fol 447), and that the diversion by the City had no effect on the market value of these properties as there was sufficient water left for all purposes. Upon cross examination (fols. 458, 467) the witness Banks admitted that he had valued the farms only for farming purposes, and that he had not allowed anything in his estimate of value for the deposits of feldspar on the farms or for the manufacturing facilities of Pine (fol. 468). He also testified (fol. 482) that he had not allowed any value to Mr. Pine's land in view of the possibility of constructing a mill pond and securing water power, and that if that could be done it would increase the value of the property in his judgment and consequently would increase his loss and damage (fol. 483). The witness Hoyt, after testifying that the diversion of the water did not make any difference in the value of the complainants' property (fol. 510), admitted (fol. 516) that he did not know how much water had been diverted; that he had been told that

about one-quarter of the water had been diverted (fol. 518), and that he did not know how great the flow was since the diversion. He admitted that he had made his estimate of value and of damage upon the assumption that a mill pond could not be created on Mr. Pine's present ownership (fol. 524), and that if the Flowage Statutes of Connecticut made it possible for Mr. Pine to establish water power upon his premises, the witnesses' estimate of value and damage would be changed. The witness Austin, after testifying that the complainants had not been damaged, admitted that if there were *future purposes* to which they might desire to put the natural flow of water, then it would be of benefit to them to have the natural flow undiminished by the diversion of the City (fol. 535). At this same folio this witness for the City sums up the case for the complainants in the pregnant phrase, "*I should say the more water there was the more value.*"

THE VERY POINTS UPON WHICH THE LEARNED TRIAL JUSTICE FOUND FOR THE APPELLEES ARE SUPPORTED NOT ONLY BY THE TESTIMONY BUT BY THE ADMISSIONS IN THE PLEADING OF THE CITY. THUS THE CITY BY ITS ANSWER ADMITS THE BUILDING OF THE DAM. IT ADMITS ITS INTENTION TO DIVERT THE WATER OF THE WEST BRANCH OF THE RIVER. IT ADMITS THAT THE COMPLAINANTS ARE INJURED AND DAMAGED, AND NO AFFIRMATIVE DEFENSE IS SET UP.

An examination of the appellants assignment of errors (p. 211) discloses the following claims:

I.—That the loss or damage of the complainants is not large enough to warrant the granting of an injunction (Assignments 1, 2, 3, 7, 8, 10, 13).

II.—That there is in the Court a power to compel the complainants to accept compensation for such damages as might be found to be sustained by them (Assignment 4), and that the public neces-

sities of the City of New York requiring that the complainants be divested of their property rights for the benefit of said municipality (Assignments 5 and 6), the Court should refuse the injunction and compel the complainants to accept damages.

III.—That the diversion being done in the State of New York under an act of the Legislature of that State and under its power of eminent domain, the Federal Courts have no power to enjoin such diversion (Assignments 9 and 12).

IV.—That there is an improper joinder of parties complainant, and that the bills should therefore have been dismissed (Assignment 11).

V.—That the Court erred in admitting improper testimony, and excluding proper testimony as to the defendant (Assignment 14).

These five points cover all the errors assigned by the city in the Circuit Court of Appeals, and it may be said embrace substantially all the points in the controversy.

I.

The case is one of riparian property and rights, which in the law are now and always have been *sui generis*. The decision must rest upon the rules and principles of the laws of riparian property as applicable to an interstate stream.

In this case a private interstate water-course has been diverted at the boundary line of the two States

whose territories it traverses. The aggressor in the one State and the injured parties in the other State are before a Federal court with their controversy. It is necessary to inquire first as to the characteristics which the two States by their respective systems of law have stamped upon that natural object which is the subject of the controversy. What are the elements which constitute property in the water course in question?

They are three by the law of both States, as they were three at the common law.

(*a.*) Each riparian owner has a right that the stream shall flow as by nature it was wont to flow.

(*b.*) Each riparian owner has the right to the use of the water, but the use of the water is limited to riparian uses.

(*c.*) If the water-course is diverted or obstructed, a legal wrong is done at the point where the effect of the diversion is felt or the injury sustained.

(*a.*) *Concerning the point that each riparian owner has a right that the stream shall flow as by nature it was wont to flow.*

"The riparian owners of lands adjoining fresh "water, non-navigable streams, take title, '*ad* "'*usque filum aquæ*,' to the thread of the stream, "and thereby acquire the right as incident to such "title to the usufructuary enjoyment of undi- "minished and undisturbed flow of such water. "'Fresh rivers of what kind soever do of common "'right belong to the owners of the soil adjacent,' "is the expressive language of the common law, "and is of universal application" (Ruger, *Ch. J.*, in Smith *v.* City of Rochester, 92 N. Y., 473.

The appellees concede that in navigable streams generally, and certainly in the State of New York, there is a public interest, supported by the incident of navigability. They are public ways.

The private interests in them are subordinate, and are enjoyed by the private owners, subject to the public interest and the jurisdiction of the State in respect thereto. Subject only to the Federal Government, the jurisdiction of the State is supreme, and injuries occasioned to private owners in such navigable streams by the State within its own boarders in promoting navigability are not legal injuries, but are *damnum absque injuria*, even as they are when resulting from the exercise of the Federal power.

Smith *v.* City of Rochester, 92 N. Y., 463.

Scranton *v.* Wheeler, 179 U. S., 141.

Rundle *v.* Delaware & Raritan Canal Co., 1 Wall., Jr., 275.

But such injuries to be *damnum absque injuria* must be occasioned by an act relating to navigability. No other purpose will sustain the act nor can any such other purpose be cloaked under navigability.

Smith *v.* City of Rochester, 92 N. Y., 463.

But the Byram River, as a private non-navigable stream, is subject to none of these conditions. It is private property, and its status is well set forth in the words of Chief Judge Ruger, *supra*.

Strictly speaking, it is not so much the stream that is property as it is the usufructuary right. Not the stream, but the use of the stream with volume and current as nature established it. The right to be usufructuary as to all the owners must in the nature of things involve reciprocal rights and duties between the owners. The upper riparian owners cannot divert from the lower riparian owners; the lower riparian owners cannot obstruct so as to flood the lands of the upper riparian owners. The property they all enjoy is the use of a stream in motion, in volume and current according to nature. When the upper riparian owners divert from the lower riparian owners, the property of the latter is

taken. So, conversely, the obstruction of the stream by the lower riparian owners so as to flood the upper riparian owners is a taking of the property of the latter. In each case user in common (which is of the essence of this form of property and without which there is in law no such property) is impaired or destroyed and property *pro tanto* is taken.

(*b.*) *Concerning the point that the use of the water is limited to riparian uses.*

In creating this species of property the law had regard to the use. The use was limited to riparian owners, and it was further laid down that the uses to which the riparian owners could put the stream must be riparian in their nature. If the stream was used by one who was not a riparian owner or was used by a riparian owner for purposes not riparian, that was by the law *pro tanto* a taking of property. Riparian uses, as is well known, were limited to the use of the water for the purposes of supplying the family of the owner, for the purpose of watering stock, for the purpose of irrigating his lands, provided those lands were riparian in their nature, and that such use was restricted so as not to impair the volume and flow of the stream. Lastly, the waters of a stream could be use for the purpose of water power, provided that after being so used the water was returned to the stream. It is obvious that the philosophy underlying these principles of the law was to maintain the stream with the volume and flow with which by nature it was created, and it may be said that the limitation upon the use of a stream, from the beginning of the common law to the present time, has been and is that the riparian owner may make such use of it as shall not impair its volume or its current as to other riparian owners. The authorities sustaining these principles will be found in the various cases cited in this brief.

One of the most important considerations in this case is that the City of New York in its use of the

water of this stream is not a riparian owner. If it claims to be a riparian owner its claim is as invalid as it is unreasonable. As shown in the résumé of the testimony set forth above, the purpose of the City in diverting this stream is non-riparian. It diverts the stream from a fertile valley of Connecticut to the City of New York, many miles away, in another water shed and there appropriates that water to alien and unnatural purposes. It needs no argument to demonstrate and no authority to sustain the view that such a use is essentially non-riparian, and such a claimant essentially a non-riparian owner.

A municipal corporation by purchasing or acquiring land upon a natural stream and thereby in respect to said land becoming a riparian owner, does not acquire the right to the use of the water for municipal purposes. This is true whether such municipal corporation is located upon the banks of the stream and takes the water immediately therefrom, or is situated at a distance and takes the water indirectly therefrom by means of an aqueduct or conduit. Such municipal purposes are not within the limit of ordinary use which the law attaches to riparian ownership.

City of Emporia *v.* Snowden, 25 Kansas, 588 (606).

Stern *v.* Burden, 24 Ala., 130 (146).

The City of New York in pressing its claim here to be considered as a riparian owner is in conflict with this well-established principle of law and is contending directly against the law as laid down by the Court of Appeals of its own State.

Garwood *v.* N. Y. C. R. R. Co., 83 N. Y., 400.

Smith *v.* City of Brooklyn, 160 N. Y., 357.

In the last mentioned case the City of Brooklyn purchased lands and proceeded to sink wells for the

purpose of procuring water for the municipal water supply. The wells were sunk to such depth and in such numbers as to draw off percolating subterranean waters from adjoining lands the ownership of which the City had not acquired. While the usual rule of law is that the owner of land is not liable for the diversion of percolating waters, yet the New York Court of Appeals held that this rule was applicable only to ordinary conditions of use and ownership, and did not apply to the extraordinary purpose for which the municipality had sunk the wells, and that, therefore, the municipality was liable in damages.

(c.) *Concerning the point that if a water course is diverted or obstructed, a legal wrong is done at the point where the effect of the diversion is felt or the injury sustained.*

Where a water course is diverted, a wrong in contemplation of law is committed at the point where the injury resulting from the diversion is sustained. If the act of diversion is in one county, and the lines affected thereby lie in another, a cause of action arises in the latter county. The better rule would seem to be that a cause of action arises in both counties.

1 Chitty's Pleadings, 259.
Bulwer's Case, 4 Coke,
Barden *vs.* Crocker, 10 Pick., 390.
Leveridge *vs.* Hoskins, 11 Mod., 257.
Stillman *v.* White Rock Mfg. Co., 3 Woodb. & M., 538.

By some Courts it has been held that at common law the cause of action was limited to the county where the lands were situated which suffered the results of the nuisance established in the adjoining county.

Wooster *v.* Winnipiseogee Lake Co., 28 N. H., 525.

Thompson *v.* Crocker, 9 Pick., 598.
Sutton *v.* Clarke, 6 Taunt., 29.

But in any case there is and always has been a cause of action arising at the point where the result of the diversion was suffered or sustained no matter at what point that diversion was effected.

As between independent states or nations there would be no cause of action in the nature of things, for there would be no court of competent jurisdiction, and the controversy would be settled by diplomatic negotiations or by an appeal to arms.

Gould on Water, 3d Ed., Sec. 488.

It seems to be a principle of international law that there is a right to a user in common as between the citizens of two States in and to an unnavigable interstate steam. Grotius states the principle thus: "So " a river, as it is a river, is the property of those people " whose the banks are or his who has the sovereign " power over them in whose power it is to make " dams or mills in it, and whatsoever is bred in that " river is his; but that river as it is a flowing stream " remains common. Every man hath the right to " drink or to draw water out of it as well as he that " owns it." This principle of international or public law corresponds with peculiar exactness to the principle of the common law or of private law, that a running stream shall flow as by nature it was wont to flow. The Government of the United States has asserted itself in support of this international principle. Thus in 1880, Mr. Evarts, Secretary of State, in an official communication to the Mexican Government asserted that the acts of the Mexicans on the west shores of the Rio Grande in diverting into ditches for irrigation the waters of that river to the injury of riparian owners in Texas were " in direct " opposition to the recognized rights of riparian " owners and if persisted in must result in disaster " and wrong to our farming population on the line " of the Rio Grande and might eventually if not

" amicably adjusted through the medium of diplo-
" matic intervention, be productive of constant
" strife and breaches of the peace between the in-
" habitants of either shore."

Wharton's International Law Digest,
2nd Edn., Vol. 1, Sec. 20.

Again in 1884, Secretary Frelinghuysen asserted in communications to the United States Minister at the Court of St. James that the construction of works on the Meduxnikuk River in the Province of New Brunswick, whereby the flow of that stream in the State of Maine was obstructed to the injury of the lumbering districts in Maine, was a proper subject for diplomatic interposition by the Government of the United States.

The question in this controversy, however, arises not between two independent nations, but between two States of the Union, or rather between citizens of two States. It may well be that the state courts of New York could decline to take jurisdiction of an action or of a suit brought by a landowner in Connecticut under the circumstances of this case, and similarly a court of Connecticut could refuse jurisdiction of a similar suit or action brought by a land owner of the State of New York. In the absence of legislative provisions in those States making it mandatory on their courts to take jurisdiction of such cases the courts of those states might hold that in each case the wrong done resulted in a local as distinguished from a transitory cause of action.

Watts *v.* Kinney, 23 Wend., 484.

The refusal of the courts of the States to entertain such controversies would not, however, in any case determine that a cause of action did not exist. It would simply develop a situation where owing to a defect in the judicial system—the lack of a court of competent jurisdiction—no method existed within the State Courts for redressing the wrong done. But Connecticut and New York are not independent na-

tions. They are not sovereignties in the full sense of that word. There is a paramount sovereignty of the United States in respect to things Federal. By that paramount sovereignty the citizens of the two States are guaranteed their property as created and vested in them by their respective States, and a system of Federal courts is established to protect the guarantee.

Angell on Water Courses, 7 Edn., Secs. 420, 421.
Rutz *v.* City of St. Louis, 7 Fed. Rep., 438.
Holyoke *v.* Connecticut River Co., 22 Blatch. (U. S.), 131.
Foote *v.* Edwards, 3 Blatch., 310.
Slack *v.* Walcott, 3 Mason, 517 (Judge Story).
Stillman *v.* White Rock Mfg. Co., 3 Woodb. & M., 538.
Thayer *v.* Brooks, 17 Ohio, 489.

In Watts *v.* Kinney, 23 Wend., 484, the nuisance was erected in the State of New ~~York~~ Jersey. Damage resulted to lands on a water course in New Jersey. Action on the case for damages was brought in New York in a State court. The Court refused to take jurisdiction of the case sustaining the view that the cause of action was relegated to the jurisdiction of the State of New Jersey, the lands damaged lying in that State. This last mentioned case seems to be regarded by the counsel for the City with some degree of favor. So far from sustaining their contention it rather sustains the contention of the appellees. The Court in which the action was brought was not a Federal court, but a State court. The law of New York at that time regarded an action on the case for damages resulting from a nuisance or trespass as local in its nature, and, therefore, relegated the suit to the courts of New Jersey. Obviously, the case has no application to a suit in a Federal court for an injunction restraining a nuisance.

Vide the authorities cited above.

It is clear, then, that by the law of the land (and alike by the law of Connecticut and New York), when the City diverted this stream in New York it committed a legal injury in Connecticut, and a right of action at once accrued to the appellees, unless, as to the act of diversion of which they complain, the Statutes of Eminent Domain of the State of New York under which the City justifies were due process of law.

This brings us to the application of the law of riparian property to an interstate stream under our political system and in view of the union of the States.

The Riparian Law and the Interstate Stream.

The riparian law of Connecticut and of New York is derived from the Common Law (N. Y. Const., Art 1, Sec. 16; Smith *v.* City of Rochester, 92 N. Y., 480; Conn. Const., Art. X., Sec. 3; Baldwin *v.* Walker, 21 Conn., 180), and the Jurisprudence of the two States is the same in respect to riparian rights and remedies. The cases from the courts of the two States cited in this brief will fully sustain this assertion. We may, therefore, dismiss from the argument all speculations as to what would be the rights and remedies here if the law of the two States presented points of difference. Where such a difference exists counsel for the appellees concede that questions of some perplexity may arise, but void as is the case at bar of such points of difference, the question submitted is solely one of the common law of riparian property considered in relation to an interstate stream.

Connecticut by an unbroken line of decisions has confirmed her landowners in their common law riparian rights. New York has done the same. More than this New York has by its highest tribunal repudiated the claim made here by its municipality. Its Court of Appeals, referring to the private water course, declared in Smith *v.* City of Rochester, 92

N. Y., 480, "NEITHER SOVEREIGN NOR SUBJECT CAN HAVE ANY GREATER THAN A USUFRUCTUARY RIGHT THEREIN."

The riparian owners of the two States from the earliest days have enjoyed their property in the water courses of the two States with the reciprocal rights and duties which the riparian law establishes. These conditions have applied as well to interstate streams, as well to the Byram River, as to water courses wholly within either State. Neither State has questioned the rule that riparian owners in their private rights could not interfere with each other even though a State boundary divided their ownership. That rule is not questioned in this case. The City's claim is based solely on its *public* status as a municipal corporation and upon its *statutes of eminent domain.* No one asserts but that if a New York ripariarn owner in private right diverted the water of this very Byram River from a Connecticut owner the latter could enjoin him. It is, therefore, clear that the two States have established their citizens in ownership along this water course with all the common law incidents of riparian ownership. On each side of the State line the usufructuary right of these owners depends on the maintenance of the natural flow of the stream regardless of the State boundary line.

Slack *v.* Walcott, 3 Mason, 517 (Judge Story).

Now, what is the argument of the appellants? It is, that conceding the nature of riparian rights and property in Connecticut and New York, as stated above, a municipal corporation of New York, under the authority of that State by its statute of eminent domain may divert in the State of New York the water course in question and so deprive the riparian owners in Connecticut of the stream, and that there is no remedy save damages.

If this be true, then it must follow that a municipal corporation under a statute of eminent domain

in Connecticut can dam this stream in Connecticut, flood the territory of New York and continue in the perpetration of the wrong—the landowners in New York being dismissed from the Federal courts without relief or with an award of damages, injunctive relief refused them, their property taken from them and the aggressor confirmed in his title.

To such monstrous conclusions does the argument of the appellants surely lead.

II.

By the taking of the river these respondents are deprived of property.

The right of a riparian owner to have the stream run as by nature it is wont to run is not a mere right or easement. In Connecticut and in New York, as by the common law, it is "property *per se*," "part of the freehold," "of the substance of the inheritance," "parcel of the land itself," "property within the meaning of the constitutional guaranty."

Parker *v.* Griswold, 17 Conn., 299.
Wadsworth *v.* Tillotson, 15 Conn., 365 (p. 372).
Harding *v.* Stamford Water Co., 41 Conn., 87 (p. 92).
Platt Bros. & Co. *v.* Waterbury, 72 Conn., 531 (p. 552).
Gardner *v.* Village of Newburgh: 2 Johns. Chan. 161
Scriver *v.* Smith, 100 N. Y., 471.
Gallagher *v.* Kingston Water Co., 25 N. Y. App. Div., 82 (p. 85).
Smith *v.* The City of Rochester, 92 N. Y., 463.
Strobel *v.* Kerr Salt Co., 164 N. Y., 303 (p. 320).

Woolrych Law of Waters, 146 (78 Law Library), 153.
Gould on Waters (3d Ed.), Sec. 204.
Black's Pomeroy on Water Rights, Sec. 9.
Angell on Water Courses (7th Ed.), Sec. 8, Sec. 90.
Washburn on Real Estate (5th Ed.) Vol. II., p. 366.
Slack *v.* Walcott, 3 Mason, 517 (Opinion by Judge Story).
Johnson *v.* Jordan, 2 Metc., 234 (Opinion by Chief Justice Shaw).

"It may be laid down as a well settled principle "that every proprietor over a part of whose land a "stream of water flows has a right that it shall "continue to flow to and from his premises in the "quantity, quality and manner in which it is ac- "customed to flow by nature, subject to the right "of the upper proprietors to make a reasonable use "of the stream as it flows past their land. *This* "*right is a part of his property in the land and in* "*many cases constitutes its most valuable element.* "*It necessarily follows, therefore, that any violation* "*of this right in the exercise of the power of emi-* "*nent domain is a taking of private property for* "*which compensation must be made.*"

Lewis on Eminent Domain, 2d Ed., Sec. 61.

The Supreme Court of the United States in Pumpelly *v.* Green Bay Company, 13 Wall., 1, have held that the backing of water by a dam in a stream so as to raise the level of a lake and thereby flood the lands of a riparian owner, though done, under statutes authorizing it, for the public benefit, is a taking of property within the meaning of the constitutional guaranty. "This proposition," said the Court, "is not in conflict with the weight of judi- "cial authority in this country and certainly not

" with sound principle." This decision reversed the judgment of the Supreme Court of Wisconsin holding that the flowing was not a " taking " of property and that, therefore, the damages were consequential.

The diversion of a stream is none the less a taking of property than is the damming back of a stream and the consequent flooding of riparian lands. The validity of both propositions depends upon the fundamental principle of riparian law that the right to have a water course flow according to nature is property *per se*.

III.

The deprivation is without due process of law.

The right of the appellees to have the waters of the Byram River flow over their lands in Connecticut as by nature they were wont to flow is property as we have shown. As these lands lie in the State of Connecticut this right is real property in the State of Connecticut. When taken, as in this case, under the statutes of another state it is taken without due process of law.

Right here is the main issue between the parties to this controversy. Is the injury of which the appellees complain the result of the wrongful taking of their property, of a direct invasion thereof, or is it but the incidental consequence of the lawful and proper exercise of a governmental power of the State of New York. The appellees assert that it is a wrongful act, a taking of their property and a direct invasion of their rights, and hence that there is a cause of action. The appellants assert that it is the result of a lawful act, a consequential and not a direct injury.

It is certainly true that if the injury to the appel-

lees is the result of a lawful act, a consequential and not a direct injury, there could and would be no cause of action. It would be *damnum absque injuria*. Unfortunately alike for the logic and validity of the appellant's claim they concede that there is a cause of action, insisting only that it is limited to the recovery of damages. The position of the appellants on this point is one of irreconcilable contradiction. There may be a lawful act and no damage, because there is no legal injury and hence no cause of action, but there cannot be, as the city asserts, a lawful act with a resulting cause of action and damage. The concession of the city that there is in the appellees a valid claim for damages enforcible at law is, therefore, a concession of the main contention of the appellees in this controversy, to wit, that they have sustained a legal injury, and that they have a valid cause of action. If this be true it remains only to consider what is their remedy and are they limited to pecuniary damages.

There can be no surer test applied to determine whether there is due process of law in this case than by answering the question—Is there a cause of action created in the appellees? For an act done in one state under a statute of eminent domain which produces actionable damage in another state is not done by due process of law. And if there is a cause of action in the appellees then is there no due process of law? It is fundamental in the law that statutes of eminent domain have no extra territorial effect. "It follows," says Mr. Lewis, in his work on Eminent Domain, "that one State cannot authorize the "condemnation of land in another State, also *that* "*it cannot authorize works which will produce* "*actionable damage in another State.*"

Lastly, it is to be remembered that the power of eminent domain takes private property for public uses. To public uses it is limited as exercised by the governments of all civilized countries, and as vested in the States of New York and Connecticut under their respective constitutions. Nothing is more ob-

vious than that public uses in the State of New York are not public uses as to lands lying in Connecticut. and such uses do not sustain a statute of eminent domain as to such lands within the constitutional limitation.

Rights which Connecticut has declared to be property, and impressed with the nature of realty and inseparably attached as part and parcel of the freeholds of her citizens are not and in the nature of things cannot be subject to the power of eminent domain of the State of New York, and cannot be taken against the will of the owner for public uses in New York.

It matters not that the means whereby the property is taken—the city's dam—is located in New York, nor that the act of diversion is committed there. By the laws of Connecticut and New York property in this water course is so ordained and established that notwithstanding the act of the city is performed in New York, the taking is perpetrated in Connecticut beyond the jurisdiction of the statutes of New York, and, therefore, without due process of law (see Slack *v.* Wolcott, 3 Mason, 517, Judge Story).

IV.

The Federal courts have jurisdiction in controversies of this kind.

By the Constitution of the United States it is declared that the judicial power of the United States shall extend to controversies between citizens of different States and to all cases in law and equity arising under the Federal Constitution. In the case at bar the controversy is between citizens of different States, and it arises under the Constitution of the United States. Viewed as a case of the taking of property without due process of law the jurisdic-

tion of the Federal courts is obvious. We need only consider the Federal jurisdiction of the case as a case of nuisance.

It is conceded by the appellees that where a trespass is committed on lands (*trespass quare clausam fregit*) lying in one circuit an action for trespass cannot be brought in another circuit where the wrongdoer is found and resides. The rule laid down to this effect in Livingston *v.* Jefferson, 4 Hughes, 606, has never been departed from. It received in that case an extended consideration from Chief Justice Marshall who expressed his own dissatisfaction with the rule and conceded that under our Federal system it left a legal injury without redress so long as the wrongdoer remained beyond the jurisdiction of the State courts where the lands lay, but the conclusion of the learned Chief Justice was that the entire preponderance of judicial opinion was in favor of the rule, and that he could not venture to disturb it. It is to be observed, however, that this rule is strictly limited in the case just cited to the case of *trespass quare clausam fregit*. There is an obvious and essential difference between trespass on lands and nuisance. In the one the act and the result are local and all the elements uniting to create the cause of action occur at one point and necessarily within one jurisdiction. In nuisance, however, this is not the case. The nature of this tort is such that frequently the act and the result of the act are widely separated. They may be in different counties and in different jurisdictions. Hence, the rule that where a nuisance is created in one county or jurisdiction resulting in injury to lands in another county or jurisdiction there is a cause of action in both counties or jurisdictions (see p. 20 of this Brief).

It is obvious, therefore, from the essential nature of nuisances that the Federal courts should take jurisdiction of nuisance cases arising between the citizens of different States. Such jurisdiction in them is essential to the peace and integrity of the Union. The authorities on this point are unani-

mous. Action for *trespass quare clausem fregit* in the circuit courts of the United States may be local and limited to the circuit wherein the trespass was committed, but actions for nuisances and suits to restrain nuisances are not local and where the act of nuisance is in one circuit and the resulting injury is in another circuit, the action or suit may be brought in either circuit. It is obvious that it will usually be brought in the circuit wherein the nuisance has been established, and necessarily so if that be the residence of the wrongdoer.

After an extended examination of the authorities touching the jurisdiction of the Federal courts in controversies of this character, the appellees' counsel believe that they are substantially unanimous.

Rundel *v.* Delaware & Raritan Canal Co., 1 Wall. Jr., 275; 14 How. U.S. 80

Foote *v.* Edwards, 3 Blatch., 310.

Holyoke Water Co. *v.* Connecticut River Co., 22 Blatch., 131.

Rutz *v.* City of St. Louis, 7 Fed. Rep., 438.

Stillman *v.* White Rock Mfg. Co., 3 Woodb. & M., 538.

Slack *v.* Wolcott, 3 Mason, 517.

V.

The remedy is by injunction.

A wrong has been done. The property of these respondents has been unlawfully appropriated and is unlawfully withheld from them by the appellant. It is in a condition to be itself restored to them. To its actual restoration they have an absolute right. They refuse to submit themselves to the statutes of

New York. They refuse to take the compensation therein provided or to invoke the protection of the tribunal created by the statute. Equally they refuse to accept damages. There is no power which can compel them. Asserting their absolute rights under the Federal Constitution and the Constitution of the State of Connecticut, they demand that their property be restored to them. It is elementary in the law that when property is wrongfully taken and withheld and is in a condition to be itself restored, the wrongdoer must return the property, and cannot, save at the election of the owner, retain the property and escape with an award of damages. To sustain and effectuate this vital principle there has been built up at law and in equity that vast framework of legal and equitable remedies on which property depends, comprising detinue, replevin, ejectment, specific performance and injunction.

If, then, there is an absolute right in these respondents to have this property returned, there must be a remedy to secure that right. It is axiomatic in the law that where there is a right there is a remedy.

What is that remedy?

By the law of Connecticut, by the law of New York and by the law as declared and administered in the Courts of the United States, it is the injunction.

Legg *v.* Horn, 45 Conn., 409.
Enfield *v.* Conn. River Co., 7 Conn., 28 (p. 50).
Parker *vs.* Griswold, 17 Conn., 287.
Water Commissioners *v.* Perry, 69 Conn., 468.
Mason *v.* Hoyle, 56 Conn., 255.
Garwood *v.* N. Y. C. R. R., 83 N. Y., 400.
Gilzinger *v.* Saugerties Water Co., 66 Hun, 173 (affd. 142 N. Y., 633).

Corning *v.* Troy Iron Foundry, 40 N. Y., 204.
Amsterdam Knitting Co. *v.* Dean, 162 N. Y., 278.
Strobel *v.* Kerr Salt Co., 164 N. Y., 303.
Holyoke Water Power Co. *vs.* Conn. River Co., 22 Blatchford, 131 (opinion by Judge Shipman).
Webb *vs.* Portland Co., 3 Sumner, 189 (opinion by Judge Story).
Randolph's Law of Eminent Domain, Sec. 28, p. 27.

(*a.*) *The remedy is by injunction, because in the nature of things that is the only remedy whereby a diverted water course can be restored to the rightful owner.*

The right to have a running stream flow as by nature it was wont to flow being property in the nature of realty was not under the protection of the remedies of law devised for restoring personal property to an owner deprived thereof by the wrongful act of another, to wit, detinue, replevin, &c. As it was usufructuary in its nature and in itself not susceptible of possession or seisin, ejectment could not be invoked.

The wrong was regarded as a nuisance or a continuing trespass and fell under the remedies applicable to nuisances and trespass and was redressed:

By personal abatement.

By the writs of *quod permittat prosternere*, of *praecipe quod reddat* and of assize of nuisance.

By trespass, nuisance and action on the case.

In virtue of the right of personal abatement the person whose lands were injured by the diversion of a water course could enter upon the premises of another so diverting it and remove the obstruction. This right was subject to the limitation that the

entry and removal must be accomplished without a breach of the peace.

Gould on Waters, 3rd Edn., Sec. 363.
Angell on Water Courses, 7th Edn., Sec. 389.

The writs of *quod permittat prosternere*, of *praecipe quod reddat*, and assize of nuisance accomplished, for the time being, the physical removal of the obstruction and the restoration of the stream to its natural channel. It will be observed that their effect was analogous to that of the injunction in equity.

Gould on Waters, 3rd Edn., Sec. 368.
Angell on Water Courses, 7th Edn., Sec. 394.

The actions of trespass, of nuisance and on the case were directed solely to the recovery of damages.

Gould on Waters, 3rd Edn., Secs. 369, 375.
Angell on Water Courses, 7th Edn., Sec. 395.

The writs, by which at common law the actual removal of the obstruction was accomplished, have long since become obsolete, and in most jurisdictions are abolished by statute.

New York retained them under the form of the writ of nuisance. This was excepted from the general abolition of writs by theRevised Statutes. 2d Rev. Stats., p. 332, Part III., Ch. V., Title IV., Secs. 1-7.

Kintz *v.* McNeal, 1 Den., 436.
McFarlan *v.* Townsend, 17 Wend., 440.

By Section 454 of the New York Code of Procedure and Section 1660 of the New York Code of Civil Procedure the writ of nuisance was formally abolished and an action in the usual form for the abatement of a nuisance substituted.

In the State of Connecticut the injunction would seem to be substantially the only remedy whereby the diverted water course may be restored to the owner. It is apparently the only remedy in that State for the physical abatement of a nuisance. The Practice Act of Connecticut (Public Acts of 1879, p. 432, approved March 28, 1879, Section 33), gave to the judges of the Superior Court power to give effect to the act by prescribing suitable forms of procedure. In the forms of procedure adopted by the judges will be found the forms of complaint prescribed in cases of diverted water courses. They are limited exclusively to complaints for injunction.

Conn. Prac. Act 1879 (published by authority, p. 185 *et seq.*).

It is the conclusion of Mr. Wood that no power now exists in any *court of law* except by statute to direct the physical abatement of a nuisance.

" Except," he says, " in those States where special " provision is made therefor by statute, no power " exists in a court of law in an ordinary action " upon the case for damages to direct the abatement " of a nuisance after a verdict establishing it. The " old common law remedies involving an abate- " ment, have become obsolete and passed into " disuse."

Wood on Nuisance, 3rd Edn., Sec. 843.

The common law writs like the modern statutory action for the abatement of a nuisance were always inadequate and inefficient for the restoration to the owner of the diverted water course, in that while they secured the removal of the particular obstruction for the time being they could not prevent its re-establishment. If the wrongdoer persisted and renewed the obstruction a second action was necessary and a multiplicity of actions was speedily engendered. No judgment at law could operate *in*

futuro to restrain the wrongdoer from a repetition of his wrong. This could be accomplished only by a decree in equity acting *in personam* through the injunction.

The injunction in equity, therefore, from the beginning was and is now the only adequate remedy for the restoration to the owner of that peculiar species of property,—the right to a water course when unlawfully taken. As equity jurisprudence developed, the injunction came more and more into practical use in cases of diverted streams, and the ancient writs of common law passed more and more into obsolescence until in our own day it may be affirmed that the injunction is the universal remedy whereby a diverted water course may be restored to and effectually secured in the owner.

We quote again from Mr. Wood (Sec. 843). Referring to the modern statutory remedies of abatement, he says:

"It is proper to say, however, that courts hesitate "to apply these statutory remedies and do not gen- "erally encourage them; and parties in a proper "case will find far more easy redress for their "grievance from nuisances in a court of equity "than in a court of law. Courts of law will always "exercise their discretion in these matters and so "far as my researches have extended in that direc- "tion, I have found that it is only in extreme cases "even when the defendant has been convicted under "an indictment therefor that they will order the "prostration or removal of a nuisance. *They pre-* "*fer to leave the parties to their redress before a* "*tribunal of larger powers and more effective reme-* "*dies where all the rights and equities of the par-* "*ties can be fully investigated. And this course is* "*not one of doubtful wisdom and has rapidly* "*grown in favor within the last half century.*"

The application of the injunction to the restoration of riparian property to its owner is simply an

instance of the rise of equity principles and remedies to a position of supremacy over those of the common law —a development to which Mr. Pomeroy in his work on code remedies has given clear expression.

"The modes and the motives of equity gradually "penetrated the common law tribunals; equitable "principles were invoked in the decision of legal "actions; the common law has become scarcely "distinguishable in the underlying juridical forces "which govern its movements from the mass of "doctrines which taken together are called equity "jurisprudence."

Pomeroy on Code Remedies, 3 Edn., Sec. 23.

The proposition here considered is directly connected with the principle of law that the taking of private property and rights in violation of the constitutional guaranty against taking property for public purposes without due compensation may always be enjoined in equity. Both rest in a measure upon the same foundation, to wit, that the violation of the constitutional guaranties is considered a wrong of such gross nature as not to be capable of legal satisfaction and adjustment.

Spelling on Injunction, 2d Edn., Vol. 1, Secs. 273, 305.

(*b.*) *The remedy is by injunction, because damages would be inadequate.*

It is necessary to distinguish between compensation and damages. Properly speaking, a statute of eminent domain provides for compensation not for damages, for it is compensation as distinguished from damages that the Constitution declares shall be made for property taken for public purposes. Were the lands of the respondents in New York they would be subject to the statutes of eminent

domain on which the city relies. These respondents would be compelled to accept the compensation provided for in these statutes, but as the lands are in Connecticut, the respondents are under no such obligation. They may, of course, if so disposed, voluntarily confirm the taking and accept the compensation provided by the statutes. If they did so, it would not be a transaction under the law of eminent domain of the State of New York deriving its sanction from the sovereign power of that State. It would be a transaction by way of contract—a voluntary sale by the appellees to the city. It is further conceded that entirely apart from the statutes of New York, the respondents could, if they were so disposed, voluntarily confirm the taking and then sue for damages, the amount of damage being the value of the property taken, and such damage, it may be assumed, would be awarded by any Court having jurisdiction over the parties. But the appellees have an inalienable right to the return to them of the property itself. That right is guaranteed to them by the Federal Constitution and by the Constitution and Laws of the State of Connecticut, and this suit is brought to enforce that right and for no other purpose.

If the relief by way of injunction sought in this suit could be denied the respondents it is obvious that they could treat the act of the city as a continuing trespass or nuisance and bring an action on the case for damages. In such an action, it is to be observed, the damages sought are not damages for the taking of property and are not measured by the value of the property, they are damages for the act of trespass or for the nuisance. The damage recovered in such a case would be only the damage sustained by the complainants up to the time of the commencement of the action or in some cases up to the time of judgment (Uline *v.* N. Y. C. R. R., 101 N. Y., 98; Stovers *v.* Gilbert, 156 N. Y., 600). The act of wrongdoing being continuous in its nature or constantly recurring or repeated from day to day,

the complainants could sue from time to time in action on the case for damages and thus a multiplicity of suits would be engendered. This of itself would give rise to the jurisdiction of equity and may be regarded as one of the fundamental bases of that jurisdiction in suits for injunction in cases of diverted water courses.

It is expressly held in Connecticut that in such an action on the case for a continuing trespass or nuisance, the party aggrieved can sue from time to time until by a multiplicity of suits they establish equitable jurisdiction. In each one of such suits, provided that an actual trespass or wrong were proven, the plaintiff could have his judgment for costs and, it may be, a verdict for nominal damages, even though he proved no pecuniary damage.

Water Commrs. *vs.* Perry, 69 Conn., 468.

The undoubted doctrine of the New York cases that the diversion of a water course imports damage and that no pecuniary damage need be proven to sustain a judgment (see this brief, p. 42) is to the same effect.

The New York Court of Appeals said in Stowers *vs.* Gilbert, 156 N. Y., 604, that "in a case like the "one at bar, where the defendant has no power to "condemn the property he has entered upon, two "remedies are open to the plaintiff,—an action at "law for damages, and a suit in equity for an in- "junction and damages. *In the action at law only* "*such temporary damages are recoverable as have* "*been sustained up to the time of the commence-* "*ment of the action, and the plaintiff may bring* "*successive actions until the defendant abates the* "*nuisance.* In the suit in equity, which is the "remedy invoked in this case, the plaintiff recovers "only his damages up to the entry of the judgment "and at the same time secures an injunction which "prevents the future trespass."

(c.) *There is no other relief in equity save the injunction. Our courts of equity have no power to withhold an injunction and to decree in lieu thereof the payment of a sum of money in the way of damages or compensation.*

It is true that in England by the Act of Parliament known as Lord Cairn's act, 21 and 22 Victoria, Chap. 27, the power was given to the Chancery Courts to award damages in lieu of the injunction in certain cases, as follows:

"II.—In all cases in which the Court of Chancery "has jurisdiction to entertain an application for an "injunction against a breach of any covenant, con- "tract or agreement or against the commission or "continuance of any wrongful act or for the specific "performance of any covenant, contract or agree- "ment it shall be lawful for the same court if it "shall think fit, to award damages to the party in- "jured either in addition to or in substitution for "such injunction or specific performance and such "damages may be assessed in such manner as the "court shall direct."

The act has resulted in some suggestive expressions of opinion from Judges of the English Courts, Judge Kerr holding that a grave necessity now arises for the exercise of a judicial discretion "in such a way "as to prevent a man doing a wrongful act and "thinking that he could pay damages for it"; and Sir James Jessel, Master of the Rolls, in Krehl *v.* Burrill, 7 Chan. Div., 554, asserting that it was never meant by the act to enable the rich man to wrong the poor man and escape with an award of damages.

But no power to grant damages in lieu of the injunction has been conferred on the Federal or State courts in this country.

(*d.*) *The so-called injunction in the alternative cannot be applied in the case at bar.*

The injunction in the alternative is limited to cases where the act complained of is committed under due authority of law. It has been granted in cases where, acting under a statute of eminent domain, property or rights have been taken without making the compensation directed in the statute. In these cases the taking being legal the courts have granted the injunction to take effect at a given time, unless at that time compensation had been paid. Where it appears in an equity suit that the defendant has no legal right to take the property, the plaintiff can not be put off with the injunction in the alternative, the injunction absolute must issue. This has been expressly held in the courts of New York, where the injunction in the alternative was largely used in the Elevated Railroad cases. In those cases there was, of course, due process of law, because there was a competent statute of eminent domain.

Pappenheim *vs.* Elevated R. R., 128 N. Y., 436.

Stowers *vs.* Gilbert, 156 N. Y., 600.

(*e.*) *The right to the remedy of injunction is not dependent on the extent of appellees' injury or the amount of their damage, nor upon any hardship resulting to the appellants from the operation of the injunction.*

The real and substantial pecuniary damages of the respondents are admitted and proven (see pp. 3, 13 of this brief). Even if there were no pecuniary damage it would not avail the appellant. It is fundamental in the law of New York and in the law of Connecticut that the diversion of a water course of itself imports damage, and the riparian owner may have his injunction irrespective of the extent of his pecuniary loss.

New York Cases:

In Corning *vs.* Troy Iron Foundry (40 N. Y., p. 204), the Court of Appeals said, by Judge Grover: "It follows that the plaintiffs had the "right to have the stream flow in its natural chan- "nel along the seven acres purchased by them; for "a violation of this right by the defendant they had "a right of recovery without proof of actual "damage, irrespective of any use of the water power "by them." And again, at page 205, the Court said, "The question then comes to this: "Whether the defendant who has wrongfully "diverted from the plaintiffs a stream affording "such a water power shall be permitted to con- "tinue such wrongful diversion and thus to deprive "the plaintiffs of what is clearly theirs without their "assent upon the ground simply that its restora- "tion would be a great damage to it. In other "words that by its continuing wrongfully to appro- "priate to its own use the property of the plaintiffs "it derives a much greater benefit than the plain- "tiffs could, by being restored to their own. The "bare statement of the question would seem to "suggest the only proper answer. The very idea "of justice is to give to each one his due. The use "of the natural flow of the stream is the due of the "plaintiffs and to justify withholding it from them "requires some better reason than loss to the wrong- "doer consequent upon its restoration."

The same Court, by Judge O'Brien, in Amsterdam Knitting Company *vs.* Dean, 162 N. Y., p. 280, said: "Where the lands of the party com- "plaining of such a diversion of running water "includes either the whole or a part of the natural "channel, equity will enjoin the continuance of the "unlawful act of the owner above and interfere by "mandatory injunction to restore the stream to its "original condition. The circumstance that the "plaintiff in such a case has shown no actual

" damage is not necessary to the application to have " the water restored to its natural course."

And in Strobel *vs.* Kerr Salt Co., 164 N. Y., p. 323, the same Court said: "Even if the damages are " slight, where the act complained of is such that " by its repetition or continuance it may become " the foundation or evidence of an adverse right, a " court of equity will interpose by injunction."

See also N. Y. Rubber Co. *v.* Rothery, 132 N. Y., 293.

Connecticut Cases:

The Supreme Court of Connecticut, by Mr. Justice Storrs, said in Parker *vs.* Griswold, 17 Conn., 302, " Whatever doubt may have been entertained " formerly upon this subject is now settled by " the uniform course of decisions both in Eng- " land and in this country that where one has a " right to the use of a stream naturally flowing " through his land, capable of being used for a bene- " ficial purpose, and it is diverted therefrom by " another, it is not necessary for the person having " such right in an action for such diversion to prove " that he has actually applied the water running " through his land for any beneficial purpose, or, in " other words, that he has sustained any specific dam- " age by such diversion interfering with his applica- " tion of the water; but that he has a right to re- " cover, notwithstanding that he has sustained no " perceptible or actual damage by such diversion. " And we think that these decisions rest on the most " satisfactory reasons."

See also

Branch *vs.* Doane, 18 Conn., 233 (p. 242).

Water Commrs. *vs.* Perry, 69 Conn., 461 (p. 468).

English Chancery Cases:

Wilts. & Berks. Canal Nav. Co. *vs.* Swindon Water Works Co., L. R., 9 Ch., 451.

Beckett *vs.* Morris (Lord Westbury) L. R. Scotch & Divorce H. of L., Vol. 1, p. 47 (1866, 1869).

Federal Cases:

In the Circuit Court of the United States in the case of Webb *vs.* Portland Co., 3 Sumner, 189, Judge Story said:

"But if the doctrine were otherwise and no action "were maintainable at law without proof of actual "damage, that would furnish no ground why a "court of equity should not interfere and protect "such a right from violation and invasion; for in a "great variety of cases the very ground of the "jurisdiction of a court of equity is that the injury "done is irremediable at law, and that the right "can only be permanently preserved or perpetuated "by the powers of a court of equity, and one of the "most ordinary processes to accomplish this end is "by a suit of injunction, the nature and efficacy of "which for such purpose I need not state as the "elementary treatises fully express them. If then "the diversion of water complained of in the "present case is a violation of the right of the plaintiffs and may permanently injure that right and "become by lapse of time the foundation of an adverse right in the defendant I know no more fit "case for the interposition of a court of equity, by "way of injunction, to restrain the defendants from "such an injurious act. If there be a remedy for "the plaintiffs at law for damages still that remedy "is inadequate to prevent and redress the mischief. "If there be no such remedy at law then *a fortiori*, "a court of equity ought to give its aid to vindicate "and perpetuate the right of the plaintiffs."

(f.) Section 723 United States Revised Statutes does not militate against the right of these respondents to their injunction. On the other hand, its effect is to sustain their right.

Section 723 provides as follows: "Suits in equity "shall not be sustained in either of the courts of the "United States in any case where a plain, adequate "and complete remedy may be had at law."

It has been repeatedly held by this Court that this provision is merely declaratory of the law as it has always existed from the beginning of Equity.

Boyce's Executors *vs.* Grundy, 3 Pet., 210, 215.

Also, "that the remedy at law in order to exclude "a concurrent remedy at equity must be as com- "plete, as practical and as efficient, to the ends of "justice and its prompt administration as the "remedy in equity."

Walla Walla *vs.* Walla Walla Water Co., 172 U. S., 12.

But, the substance of the appellees' contention is that in the case at bar there is no plain, adequate and complete remedy at law whereby this property, wrongfully taken and wrongfully withheld, can be restored to the rightful owners. The equitable remedy of injunction alone can redress the wrong.

Moreover, the Federal courts have construed this provision to the effect that where a statute of a State creates a new right or provides a new remedy the Federal courts will enforce that right, either upon the common law or equity side of its docket, as the nature of the new right or remedy requires, saving only that the provision of the Federal Constitution preserving jury trials in *common law* cases must not be infringed.

Cummings *vs.* Bank, 101 U. S., p. 153.
Van Norden *vs.* Morton, 99 U. S., 379.
Grether *vs.* Wright, 75 Fed. Rep., 742.

The United States Supreme Court said in Smyth *v.* Ames, 169 U. S., p. 516: "It is true that an enlargement of equitable rights arising from the "statutes of the State may be administered by the "Circuit Court of the United States. * * * A "party by going into a National court does not, "this Court has said, lose any right or appropriate "remedy of which he might have availed himself "in the State courts of the same locality; the wise "policy of the Constitution gives him a choice of "tribunals. * * * A State cannot tie up a citizen of another State having property rights "within its territory invaded by unauthorized acts "of its own officers, to suits for redress in its own "courts."

The right in Connecticut and in New York to the injunction in such a case as the case at bar has been demonstrated to be clear. To that same equitable remedy the appellees are entitled when by reason of diverse citizenship or a question of constitutional law they have come into the Federal Courts. This view is further enforced by the consideration that the question arising here is a question arising under the law of real property. The real property involved is located in the State of Connecticut. In cases involving real property and rights therein, the Federal Courts regard and apply the law of the State within which such real property lies.

Jackson *vs.* Chew, 12 Wheaton, 153.
Burgess *vs.* Seligman, 107 U. S., p. 20.

The City of New York, a municipal corporation of the State of New York, defending this case in a Federal Court, sets up under Section 723 the claim that the Federal Court has no right to administer, upon the prayer of the bill, the very relief and to afford the very remedy which the law of the State of New York declares to be the relief and the remedy

in like cases. The validity of the City's claim is denied by the authorities.

Grether *v.* Wright, 75 Fed. Rep., 742.

Again it may be said that, the City of New York having taken, under a statute of the State of New York, property in the nature of realty located in Connecticut, asserts that the relief and the remedy provided for the wrong, both by the law of Connecticut and by the law of New York, cannot be obtained in the Federal Courts because of Section 723. It is submitted that such a contention is without validity in law and without support in reason.

Lastly, the jurisdiction in equity of the Federal courts is (subject to the limitations of the Federal Constitution) substantially the same as that of the English Court of Chancery.

The remedy of injunction in cases of diverted water courses has always been recognized in the English Chancery Courts, and has been a remedy of frequent application. It is embraced within a field where equity has always had unquestioned jurisdiction—that of enjoining nuisances.

The Attorney General *v.* Council of Birmingham, 4 K. & J., 528

Stokes *vs.* Banbury Board of Health, L. R., 1 Eq. 42.

Lane *v.* Newdgate (Lord Eldon), 10 Vesy, J., 192.

Bush *v.* Western (1720).

Rockdale Canal Co. *v.* King, 2 Sumner's Rep., N. S., 78.

Robinson *v.* Lord Byron (1785), 1 Brown's Ch. Reps., 588 (Lord Thurlow).

Elwell *vs.* Crowther, 31 Beav, 163.

Chalk *v.* Wyatt, 3 Merivale, 688 (Lord Eldon).

Grand Junction Canal Co. *v.* Slingar, L. R. 6, Chan. App., 488.

Attorney General *vs.* Great Eastern Rly Co., L. R. 6, Ch. 572.

Clowes *v.* Staffordshire Waterworks Co., L. R. 8, Chan. 125.
Wilts. and Berks. Canal Navigation Co. *v.* Swindon Water Works Co., L. R. 9 Ch. 451.

(*g.*) *The claim of the appellant that equity can not grant the injunction until the appellees establish their rights at law by a jury trial is error. There are no rights to establish. The essential facts are admitted.*

It is true that equity has sometimes refused the injunction until a trial at law was had, but this has been done only in cases where the facts were disputed and the legal rights of the parties being in doubt it was necessary to establish them at law before the right to the injunction could be determined.

New York Cases:

"This Court," it was held by Chancellor Kent, "may issue an injunction to prevent the obstruction "of an ancient water course though the plaintiff "has not established his title at law."

Gardner *v.* Village of Newburgh, 2 Johns. Chan., 164.
See also Corning *v.* Troy Iron Foundry Co., 40 N. Y., 191.

Connecticut Cases:

The Supreme Court of Connecticut in Roath *vs.* Driscoll, 20 Conn., 538, said: "This is an application "to a court of equity to prevent the defendant "from using a certain reservoir of water situate "upon his premises. The Court doubtless possesses "the necessary power, but it is not to be exercised as "a matter of course, even when the plaintiff suffers "some injury to his real estate. *Whenever the right* "*is doubtful or needs the investigation of a jury*

" *upon facts in dispute* a court of equity is always " reluctant to interpose its summary authority, " for it is rather the duty of the Court to protect " acknowledged rights than to establish new and " doubtful ones."

See also, Walcott *v.* Robbins, 26 Conn., 236.

English Chancery Cases:

Finch *v.* Resbridge, 2 Vernon, 390.

Bush *v.* Western Prec. in Chancery, 530.

Mayor of Cardiff *v.* Cardiff Waterworks Company, 4 De G. & J., 596.

Goodson *v.* Richardson, L. R., 9 Chan., 221.

Federal Cases:

Mr. Justice McLean (U. S. S. Ct.), writing the opinion of the Circuit Court in Spooner *vs.* McConnell, 1 McLean, 355, said: " Must the right of the " complainant be established at law before he can " claim an injunction? This is earnestly contended " by the defendants. Whatever doubts may have " formerly existed on this subject there seems to be " no ground for it at this day. The injunction is " issued because under the circumstances of the " case it is the only adequate remedy."

Perry *v.* Parker, 1 Wood & M., 280.

Hogge *v.* Kansas City Ry. Co., 104 Fed. Rep., 391.

Chancellor Manning, of Michigan, said in White *vs.* Forbes, 1 Walker, 113: "This Court may stay " or prevent nuisances by injunction. Sometimes " the claimant is required to establish his right at " law before equity will protect him by injunction " in the enjoyment of it; *but that is only when the*

" *right on which he bases his claim to the interposi-*
" *tion of the Court is doubtful and in dispute.*"

And Eden on Injunction expresses the law thus:
" As the matter complained of is not, therefore,
" *ipso facto* a nuisance, but may be so, according
" to circumstances, it becomes necessary to ascer-
" tain those circumstances by verdict; *but where it*
" *is in itself a nuisance, the Court (if there is suffi-*
" *cient evidence of its existence) is competent to re-*
" *strain it without a verdict.*"

Eden on Injunctions, 3rd Am. Ed. (Waterman), Vol. 2, p. 274.

See also Spelling on Injunctions, 2 Ed., Vol. 1, Secs. 20 and 21.

(*h.*) *The right of the appellees to the injunction does not depend upon the exercise of judicial discretion. Where the injunction is sought as the remedy for the diversion of a water course, the right to it is substantially absolute.*

There is a class of acts which being lawful in themselves yet resulting in pecuniary damage to others equity will enjoin because of the damage, *i. e.*, because of the results of the act.

Such acts are usually violations of the maxim that one should use his own property in such a manner as not to injure that of another.

There is another class of acts which being unlawful in themselves equity will enjoin because of their unlawful character, without regard to the pecuniary damage. The injunction is granted solely because of the nature of the act.

To this class belong direct invasions of right, the continued appropriation of another's property, continuing trespasses and continuous nuisances in which, as we have seen, the legal remedy of abatement and the legal remedy of damages are inadequate (*vide supra*, pp. 34-39).

In the first class of cases the act being in itself lawful there is a discretion in equity to what extent

it will control it. In the second class of cases, the act being in itself unlawful and incapable of redress at law, equity always grants the injunction. In the second class of cases the discretion of equity has become a mere matter of theory.

Where, as in the case of a diverted stream, there is a wrongful taking of property, to the restoration of which the plaintiff is entitled, and there is no remedy known whereby that restoration can be secured save by the injunction in equity, it is not too much to say that the right to the injunction is absolute. There is no discretion in the Court.

VI.

Concerning certain cases cited by the appellant's counsel and in the dissenting opinion.

Brickett *v.* Haverhill Aqueduct Co., 142 Mass., 394; Banigan *v.* City of Worcester, 30 Fed. Rep., 392; Manville *v.* City of Worcester, 138 Mass., 89:

These cases are thoroughly discussed and disposed of by the Court below in its opinion and it is quite unnecessary to add anything to what is said there. Each case was an action for damages by a riparian owner in Rhode Island for damage to riparian rights resulting from an act committed in Massachusetts under the authority of the law of that State. As each action was for damages, it is obvious that in each case the party aggrieved confirmed the taking, submitted himself to the jurisdiction of Massachusetts and sought the compensation which the wrongdoer was willing to pay. This is sufficient to distinguish these cases from the case at bar. In the late case of Mulhall *v.* Fallon, 176 Mass., 266, Chief

Justice Holmes, who wrote the opinion in the case of Mannville *v.* City of Worcester, comments on the decision in the latter case quite in line with the comments of the Court below in this case, and so limits the decision as largely to eliminate from the dicta in the opinion support for the contentions of the appellants here.

Head *v.* Amoskeag Manufacturing Co., 113 U. S., p: 7

This case is cited in the dissenting opinion in the Court below. But it involved no interstate element. The stream in question there was wholly in New Hampshire, and all rights and remedies arose and existed under one system of laws. The question there arose under the flowage acts of New Hampshire. The decision goes no further than to hold that the flowage acts of that State rest not upon the power of eminent domain, but upon the element of user in common—one of the constituent elements of riparian property—and that such flowage acts are not unconstitutional and cannot be said to take property without due process of law. But the essential distinction between the case of Head *v.* Amoskeag Manufacturing Co. and the case at bar is that the former was a case between riparian owners—a mere question of regulating riparian uses within the dominion of a single State. This is not true of the case at bar, which is a controversy between riparian owners in one State and a non-riparian claimant in another State, where the latter seeks to wrest the riparian property wholly from the riparian owners and apply it to non-riparian uses. (See also Wurts *v.* Hoagland, 114 U. S., 606; Matter of Tuthill, 163 N. Y., 133.)

United States *v.* Rio Grand Irrigation Co. 174, U. S. 690:

This case is cited by the City's counsel as authority for the contention that a State may change its

common law rule in respect to riparian rights or property, and permit the appropriation of flowing waters for such purpose as it deems wise. It is hardly necessary to state that in this proposition counsel for the appellees substantially agree. As a proposition of law it seems to be quite elementary. But it is certainly to be taken subject to the provision for compensation to private owners, within the State, deprived thereby of their property, and it is to be limited to the dominion of the State. No extra-territorial injury can be inflicted nor can the law authorizing the change have an extra-territorial effect. To this extent this Court was careful to limit all that it said in the case of the United States *v.* Rio Grande Dam & Irrigation Co. Referring at page 704 of the opinion to the irrigation statutes of some of the western States and to their undoubted effect in changing the common law status of riparian property this Court said:

"*So far as those rules have only a local significance* " *and affect only questions between citizens of the* " *State, nothing is presented which calls for any* " *consideration by the Federal courts.*" And at every point in its opinion this Court was careful to limit the power to change the law governing the status of riparian property to "*the dominion of the State.*" Therefore, every element is eliminated from the case which could make it authority in a case involving the diversion of an interstate stream.

Pennsylvania Coal Co. *vs.* Sanderson, 113 Pa. St., 126:

This case held that the use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners are subject to the results of working coal mines draining naturally into the stream and must *ex necessitate*, give way to the

interests of the community in order to permit the development of the natural resources of the country. It is the leading case sustaining a rule of property law developed in the State of Pennsylvania out of its vast mining interests, and, in the nature of things, is limited to the dominion of that State. Appellees' counsel are unable to see in it anything applicable to the case at bar, for it involved no interstate element and they do not contest the sovereign right of one of the States within its own dominion to make its property law what it will. But this Pennsylvania case is relied upon by the City's counsel to establish the point that because the public interest of New York may be said to necessitate the diversion of this river, the property rights of these appellees in Connecticut must give way. It is difficult to discern the application of the Pennsylvania doctrine to the case at bar. The appellee's counsel deem it sufficient to suggest that this Pennsylvania rule or doctrine is not recognized in the law of Connecticut and has been very recently expressly and wholly repudiated by the Court of Appeals of the State of New York. That Court, in Strobel *v.* Kerr Salt Co., 164 N. Y., 319, referring to this Pennsylvania rule and to the case of Pennsylvania Coal Co. *vs.* Sanderson, said: "We have never adopted that rule in this State and "no public necessity exists therefor, even if it would "ever warrant the courts in relaxing rules for the "protection of property of small value in the in- "terest of some business required to develop the re- "sources of the State, in which much capital had "embarked, giving employment to a great number "of people."

Parker *vs.* Winnipiseogee Cotton & Woolen Co., 2 Blacks Rep , S. Ct. of U. S., 545:

In this case this Court refused to interfere when the Circuit Court had refused the injunction. But the case involved no interstate element. It was a

simple question of a conflict of rights between riparian owners in New Hampshire. The rights of both parties, the Court points out, were involved in doubt, and a trial at law was necessary to determine these disputed rights. "The appellant," said this Court, at page 553, "can have no standing in a court "of equity until he has laid this foundation for "relief. This objection is fatal to the case. We "decide nothing else."

But, in the case at bar as already pointed out, there is no dispute as to legal rights and titles, and no question as to facts.

VII.

Concerning the defendant's claim that there is an improper joinder of parties and that the bill should therefore have been dismissed.

It is submitted that there is no improper joinder of parties plaintiff. It is the universal rule that such a joinder of parties plaintiff as exists in this case is proper in an injunction case of this character.

Story's Equity Jurisprudence, Sec. 279.

Adjacent or neighboring owners of realty may unite in a bill to enjoin a common nuisance.

Watertown *vs.* Cowen, 4 Page's Chancery, 510;
Murray *vs.* Hay, 1 Barbour's Chancery, 59;
Cadigan *vs.* Brown, 120 Mass., 493;
Taylor *vs.* Bay City Company, 80 Mich., 77;

Mitchell *vs.* Thorn, 134 N. Y., 536.
Ballou *vs.* Inhabitants of Hopkintown, 4 Gray, 324.

Even if there were an improper joinder it is too late now for the defendant to raise the objection. It could be raised by the defendant only by demurrer, plea or answer.

See Oliver *vs.* Platt, 3 Howard, 412.
Livingston *vs.* Woodward, 15 Howard, 546.

VIII.

The history of the law touching the point at issue presents an unbroken line of authorities in support of the views expressed above in favor of the appellees.

1825 Slack *v.* Walcott, 3 Mason, 517, Judge Story said:

"It is true that a state has jurisdiction over the "waters of the rivers which flow within its boun- "daries and may by its laws regulate the title, "enjoyment and use of them while and so long as "they flow within its boundaries. But its author- "ity stops here. The right to the use of the same "waters when they flow beyond its boundaries is "not within its control. The title is not acquired "under the laws of such State."

1830 Farnham *vs.* Blackstone, Canal Company, 1 Sumn., 46:

This case also came up before Judge Story. The litigation involved the question of interference by one State with a river flowing in another State. The defendant's counsel conceded that no authority

existed for the enactment of a law in one State adversely affecting riparian rights in an adjoining State. Judge Story in his opinion referred with gratification to the stipulation of the defendant's counsel in that it relieved the Court from considering a point of great importance.

1845. United States *vs.* Ames, 1 Wood. & Min., p. 76.

In this case the question arose as to the interference with the manufacturing operations of the United States Government, carried on upon a piece of land ceded to the Government by the State of Massachusetts. The interference was alleged to be under a statute of eminent domain, passed by the Legislature of the State of Massachusetts, authorizing certain acts by defendant in respect to a water course which, traversing the State of Massachusetts, passed through the tract of land so ceded to and in use by the United States Government. Judge Woodbury, who heard the case, reached the conclusion "that as the land so ceded "was for all the purposes of the case before him "extra-territorial to Massachusetts, a statute of "Massachusetts was no justification for the inter-"ference with the water rights of the United States "within the ceded territory."

1855.

In December of this year, Gov. Pollock, of Pennsylvania, asked the opinion of the Attorney General on the question of the right of the State of New York to divert the water of the Chemung River. It seems that the State of New York had erected a dam across the Chemung River within the State of New York. That river rises in Pennsylvania and flows thence into New York, and after traversing a portion of the latter State, flows again into Pennsylvania, and empties into the Susquehanna. The purpose of the dam erected in New York was

to divert the water of the Chemung River from its natural course through the State of Pennsylvania in order to supply the Chemung Canal in the State of New York. The Chemung Canal discharged its water into Seneca Lake, whence it passed into Lake Ontario, so that by the diversion the waters of the Chemung River were entirely cut off from their natural channel in the State of Pennsylvania. The Attorney General of Pennsylvania (Thomas E. Franklin), to whom the question was submitted, in his opinion, said: "The dominion of "a State includes the lakes enclosed within it and "the rivers which flow through its territory; but "the running water of a river cannot be appropri- "ated either by a State or its inhabitants in such "manner as to prevent its natural flow into the "territories of a State below and thus to deprive "the lower State or its inhabitants of the use of "the river or its water in as beneficial a way as "they would be otherwise able to enjoy it."

4 American Law Register, p. 385.

1881. Rutz *vs.* City of St. Louis, 7 Fed. Rep., p. 438.

In this case the City of St. Louis, under authority of a statute of the State of Missouri, had erected a structure within said city, on the banks of the Mississippi River, the result of which was to so interfere with the current of that river as to injure by the washing of its waters, the land of the complainant Rutz on the opposite side of said river in the State of Illinois. The structure erected by the City of St. Louis was for the purpose of improving the navigation of the Mississippi River at the point in question. Rutz commenced an action at law for damages against the city. The city demurred to his complaint. The Court overruled the demurrer and Judge Treat, in rendering the opinion, held that a State may authorize a structure within its own boundaries upon a navigable river for the purpose of improving navigation, which,

without such authorization, would be considered a nuisance, and its own citizens must accept the legal consequences, though not without recovery of damages, but the citizens of an adjoining State whose property in that State was injured by the erection of said structure are not subject to such legal consequences.

1884. Holyoke Water Power Company *vs.* Connecticut River Company, 52 Connecticut, 570.

In this case the plaintiff was a Massachusetts manufacturing corporation, having its works at Holyoke, in Massachusetts, on the Connecticut River. The defendant was a Connecticut corporation formed for the purpose of improving the navigation of the Connecticut River within the State of Connecticut with power to construct canals, dams, &c., acting under statutes of eminent domain of the State of Connecticut. The defendant established a dam on the Connecticut River within the State of Connecticut, the result of which was to set the water of that river back upon the manufacturing works of the plaintiff within the State of Massachusetts, overflowing their lands and interfering with their operations. The suit was for an injunction. The Court granted the injunction. Judge Shipman, who tried the case, said in his opinion:

> "Jurisdiction confers the power and the "right to inflict consequential injury, but "when no jurisdiction exists the right ceases "to exist. It is a recognized principle that "the statutes of one State in regard to real "estate situate in another State cannot act "extra-territorially. As Connecticut has no "direct jurisdiction or control over real estate "situate in another State, it cannot indi-"rectly, by virtue of its attempted improve-"ment of its own navigable waters, control or "subject to injury foreign real estate."

1894.

In this year the City of Boston initiated a movement to secure from the Legislature of the State of Massachusetts the right to take water from the Nashua River for the supply of the inhabitants of Boston. The Nashua River rises in Massachusetts, flows thence into New Hampshire, where it empties into the Merrimac River in New Hampshire. The owners on the Nashua River in New Hampshire, apprehending injury in case the proposed diversion was effected, retained Messrs. George B. French and Jeremiah Smith* of the New Hampshire bar as counsel, and obtained from them an opinion which in an exhaustive examination of the cases and text books leaves nothing to be desired. The opinion was emphatically against the power of the State, even under the act of the Massachusetts Legislature, to divert the river. It would seem that the City of Boston abandoned its plan. The opinion of Messrs. French and Smith was printed in the Harvard Law Review, Vol. 8, page 138, under the title "Power of a State to Divert an "Interstate River."

The last contribution to the law on the subject under discussion would seem to be the learned opinion of the trial Judge of the Circuit Court in the case at bar as affirmed by the Circuit Court of Appeals. Upon him, at the close of his long and honored career, has devolved the task of declaring one more principle in defense of the integrity of private property and the maintenance of private rights against governmental aggression. He has declared the law and laid out the land-marks in accordance with fundamental principals and time honored authorities, and it is submitted that no valid reason can be presented for the reversal of his decision upon this appeal.

*Formerly Justice of the Supreme Court of New Hampshire and one of the faculty of the Harvard Law School.

IX.

The decision of the United States Circuit Court of Appeals for the Second Circuit should be affirmed.

New York, February 11, 1902.

CHARLES C. MARSHALL,
STEPHEN G. WILLIAMS,
Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1901.

THE CITY OF NEW YORK and BIRD S. COLER, as Comptroller thereof, Appellants,

vs.

SAMUEL PINE and FREDERICK MULLER, Appellees.

No. 491.

ADDITIONAL BRIEF FOR APPELLEES FILED AFTER ORAL ARGUMENT.

Near the close of the oral argument of this case several questions were put by certain of the Justices to the counsel for the appellees, a consideration of which has convinced the counsel that they had failed to make clear in the beginning of their argument one of their fundamental premises (see Original Brief, Point I. (a) and Point II).

That premise is this: That the property which has been taken is not property in water, but the right to the current or flow of the stream; that this right is real estate located in Connecticut, and, therefore, not subject to the jurisdiction of New York in any respect either as to the statutes of its Legislature or as to the processes of its Courts.

Counsel understood this question to be asked:

" Suppose the use of this water was vital to the " interests of the people of the City of New York?"

The answer is that if the property of these complainants in the flow of the Byram River is property inseparably attached to and a constituent element of their freeholds in Connecticut, then it is real estate in Connecticut and cannot be reached by the statute of the State of New York, and it makes no difference how great is the necessity of the City of New York. It would seem axiomatic that one State cannot, through the operation of its laws or the process of its courts, take real estate situated in another State, no matter how great the necessity.

This question it was understood was also asked:

" If the water, before it gets to you is in another " State and that State deals with it and the water " never comes to you, so that you do not reduce it to " possession, is not your action one in damages and " are you not put in a position where you cannot " complain that your property has been taken with- " out due process of law, because it is taken before " it comes to you?"

This question embraces the very gist of the controversy and would seem to express, what we conceive to be, the City's theory of the law, but with all deference we submit that the question is based on a view of riparian property without support in the common law and antagonistic to the law of riparian property as established in Connecticut and in New York. The question assumes that there is property in the water and that there is a divisibility or apportionment of the water possible according to lines of ownership, and, therefore, according to State lines or jurisdictional lines, but such is not the case. There

is no property in the water and no possession of the water—the property is in the flow of the stream, in the *flux*. This case does not involve the question of property in water as an element. It is a case of *riparian* property, not of water. * Blackstone says: "The property is in the current." The flow is an entire thing; in the nature of things it cannot be considered as anything else than an entirety. As such an entirety it extends from the source of a river to the mouth. This flow cannot be interrupted at any point without being interrupted at every point and real estate thereby taken *pro tanto*.

This idea of the property being [redacted] in the flow as an entirety lies at the very base of the common law of riparian property and as a basic principle, it has been repeatedly reaffirmed by the Courts of Connecticut and of New York and incorporated into the very life and being of riparian property in those two States.

It has received express recognition in the opinions of this Court. Thus, in Sturr *v.* Beck, 133 U. S., 547, the learned Chief Justice defined the right of a riparian proprietor of land bordering upon a running stream to be the benefit to be derived from *the flow of its waters*, and in United States *vs.* Rio Grande Company, 174 U. S., p. 702, a learned associate Justice defined the right or property *as in the continuing natural flow*.

We have said above that this right to the undiminished flow is real estate, and so the common law, the law of Connecticut and the law of New York, regard it. It is not a mere easement, it is not a personal right. It is more even than an incorporeal hereditament. It is a corporeal hereditament. It is, therefore, property, *tangible* and *visible*, according to the definition of a corporeal hereditament. It is not a mere right in the freehold of Pine

* See Chitty's Blackstone, Vol. 1, Book 2, Star page 403.

and the freehold of Muller, but is part of each of those freeholds; a constituent element in the legal conception of real property in those freeholds. The Courts of Connecticut and the Courts of New York have used every expression apt to express this idea. They have said it was "parcel of the land itself," part of the freehold, "of the substance of the inheritance." The Supreme Court of Connecticut, in Wadsworth *v.* Tillotson, 15 Ct., p. 372, defined it thus:

"Every proprietor of land through which a nat-
" ural water course runs has an equal right to the
" use of the water for every useful purpose to which
" it can be applied, as it is wont to run without
" diminution or alteration. *This right is not an*
" *easement or appurtenance, but is inseparably an-*
" *nexed to the soil, and is parcel of the land itself.*"

And in Harding *v.* Stamford Water Company, 41 Ct., p. 92, they reaffirm and amplify this legal principle:

"These defendants then *can have no more right*
" to divert the water of this stream from the land
" of the plaintiffs or to use the same, except in a
" reasonable manner for proper purposes as it passes
" over their lands, *than they have to take the mill of*
" *the plaintiffs or the land on which it stands and*
" *appropriate them to their own or to the public*
" *use.*"

The New York Court of Appeals after an elaborate consideration of the precise nature of this right to the undiminished flow of the stream, in Scriver *v.* Smith, 100 N. Y., p. 471, declared that while the right has some semblance to an easement it is not, in fact, a real easement, but a corporeal right. It adopts there, at page 479, the definition of Washburn on Easements, 19, as follows:

"The term 'natural easements,' as ap-
" plicable especially to the case of flowing

"water, is often made use of by courts of "common law, and is not likely to mislead "the reader, inasmuch as the context usually "shows in what sense the term is employed. "But, as will appear hereafter that an ease- "ment, when technically considered, is an in- "terest which one man has in another's es- "tate by grant, or its equivalent—prescrip- "tion, it seems at first thought to be incon- "sistent to characterize what belongs to an "estate as inseparably incident thereto and "forming part and parcel thereof, by the "name of easement or servitude. It may be "in many respects, and perhaps most respects, "like an easement and may be treated ac- "cordingly, and yet will hardly come within "the requirements of what constitutes an "easement at common law."

And again, quoting from Mr. Washburn, the Court says:

"The right of enjoying this flow without "disturbance or interruption by any other "proprietor is one *jure naturæ* and is an in- "cident of property in the land, not an "appurtenance to it, like the right he has to "enjoy the soil itself in its natural state un- "affected by the tortious acts of a neighbor- "ing land-owner. It is an inseparable inci- "dent to the ownership of land, made by "an inflexible rule of law an absolute and "fixed right, and can only be lost by grant or "twenty years adverse possession."

And in the same case the Court quotes approvingly the definition of Angell on Water Courses, Sec. 90:

"The right to the use of the flow of water "in its natural course and to the mainte-

"nance of its fall on the land of the proprietor "is not what is called an easement, because "it is inseparably connected with and inher- "ent in the property in the land; it is a parcel "of the inheritance and passes with it."

The Court also quotes with approval the definition of Judge Erle in Stokoe *v.* Singers, 8 Ell & Bl., 31 —"The right to the natural flow of water is not an "easement, but a natural right"; and the definition of Chief Justice Shaw in Johnson *v.* Jordan (2 Metc., 234) "It is inseparably annexed to the soil "and passes with it, not as an easement, not as an "appurtenance, but as parcel."

The New York Court of Appeals concludes this exhaustive review of the subject as follows—"Ease- "ments proper are incorporeal rights, but the right "to have water flow in its natural channel is a "corporeal right."

By the statute law of New York it is expressly declared that the terms real property and land as used in the Real Property Law of New York are co-extensive in meaning lands, tenements and hereditaments.

N. Y. Real Property Law, Chap. 547, Laws 1896, Art. 1, Sec. 1.

The learned Chief Justice of this Court in his opinion in Sturr *v.* Beck, 133 U. S., 547, fully recognized and adequately expressed this basic principle of common law riparian property when he said that the right of the riparian proprietor to the flow of the stream is "*a natural incident to or one of the elements of his estate.*"

This right to the undiminished flow of the stream existing in the complainants in this case is, therefore, real estate and part and parcel of their freeholds in Connecticut, and, it is submitted that the City of New York cannot take that real estate in Connecticut through any statute of eminent domain

enacted by the Legislature of New York. To do so is to take property without due process of law contrary to the provisions of the Federal Constitution.

It is true that the nature of this property is such and the natural conditions comprised in the territory of New York and Connecticut are such that New York has the physical power to take this real estate, but a distinction must be drawn between physical power to take this real estate in Connecticut and the legal right to take it. If New York cannot operate these public works and utilize the Byram River within the State of New York without divesting vested rights in Connecticut and taking real property there, then New York must cease to operate these public works, and must refrain from diverting the Byram River even within its own territory. It is the exercise of physical power in absence of legal right to divert an interstate stream and thereby to take property outside of the jurisdiction of the act of diversion that makes such diversion *casus belli*, as counsel for the appellees contend, in international law. It is the moral wrong that is done, the use of physical power unsupported by moral or legal right that lays the basis for a just cause of war.

If the City of New York had taken condemnation proceedings under the Condemnation Law of New York and had served process upon Pine and Muller it could not have divested them of this riparian property, to wit, the right to the undiminished flow of the Byram River, for that right being real estate in Connecticut was beyond the effect of the statute of New York and beyond the process of her courts. No jurisdiction of that real estate could be acquired, even though jurisdiction of the persons of Pine and Muller was acquired, for it is only personal rights and personal property that follow the person. Rights in the nature of realty, especially when they have the status of corporeal rights inhere in the land and their *locus in quo* is the *locus in quo* of the land,

and they are subject only to that jurisdiction which embraces the land.

This question it was understood was also asked:

"*Do you contend that under the common law, but* "*where there is a constitutional limitation against* "*taking of property the nature of the riparian* "*right as property is such that the law making au-* "*thority, although it could not take property with-* "*out compensation, could not define the nature and* "*extent of the riparian ownership, and the legal* "*nature and character of the use to which the flow-* "*ing water should be put?*"

This is in a measure answered by much that is said above. Of course, the law makiug authority may change the nature and extent of the riparian right and property as to all real estate within the jurisdiction of the law making power, making compensation to owners whose real estate within such jurisdiction might be thereby taken, but it cannot directly or indirectly, even as the result thereof, change the legal nature and character of riparian ownership outside of the jurisdiction of such law making power, nor alter the incidents of or detract from the estates of riparian owners outside of such jurisdiction. To do so would be to divest vested rights in realty outside of the jurisdiction of such law making power, and to take away *pro tanto* the extra-territorial real property of riparian owners. To do this, as we have frequently asserted in this case, is *casus belli* in international law, as between independent nations, but under the Constitution of the United States and the union of the States, it is a taking of property without due process of law. It is, therefore, unconstitutional and void, and owners aggrieved thereby have a constitutional right for redress in the Courts of the United States, who must restore to them their property.

The use of the injunction for this purpose ~~and a consideration of it~~ as the only remedy whereby property of this nature can be restored to its rightful owner has been fully considered under Point V. of the original brief, and was discussed at length on the oral argument.

CHARLES C. MARSHALL,
STEPHEN G. WILLIAMS,
Of Counsel.

NEW YORK, March 8, 1902.

Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 491.

THE CITY OF NEW YORK and BIRD S. COLER, as Comptroller thereof, Appellants, AGAINST SAMUEL PINE and FREDERICK MULLER, Appellees.	On writ of *certiorari* to the United States Circuit Court of Appeals for the Second Circuit.

PETITION OF APPELLEES FOR REHEARING.

TO THE HONORABLE THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Samuel Pine and Frederick Muller, appellees in this case, respectfully petition for a rehearing by this Court, to the end that the point of laches or estoppel upon which the Court has rendered a decision in this case may be argued in this court, and that the decision heretofore rendered may be reconsidered after such hearing to such end as to the Court shall seem just.

The petitioners concede that an application for a rehearing in the case of a unanimous decision is unusual, and would not recommend itself to favorable consideration were it not for what seems to us the ob-

vious irreconcilability between the facts in the record and the decision, and for the fact that the decision is based wholly on a point, knowledge of all grounds for which was disclaimed by the counsel for the appellant at the bar of this court, and which point was not discussed in the oral arguments or briefs of counsel for either party, so that the property of these petitioners is in effect taken away from them on grounds concerning which their counsel have not been heard.

The case, as decided, involves the question of the extent to which the constitutional guaranty against the taking of property without due process of law may be lost by laches or estoppel. It also involves the interstate question as to whether the public corporations or municipalities of one State in relation to the citizens of other States and their property are or are not public corporations. The case, therefore, involves a constitutional question.

The effect of the decision is to deprive the appellees of their property and to vest it in the appellant, the City of New York, which has seized the same without authority of law—subject only to an award of damages which must be proven under technical rules of law and in respect to a species of property obviously most difficult of valuation; and all this in face of the fact that the appellees demand the return of their property and that the same exists within the jurisdiction of the Court in a condition to be returned.

The suit was brought by complainants as riparian owners on the Byram River in Connecticut to restrain the City from diverting the west branch of that river by means of a dam three miles above under erection by the City in the State of New York near the boundary line between that State and Connecticut. The bill was filed two years after the City commenced work on the dam, at which time the City alleges in its answer the dam was nowhere near completion. The bill was filed one year before actual diversion, and only on information and belief

that such diversion was intended. On these points the pleadings and testimony show an entire agreement between the parties.

The grounds on which this Court has denied to the appellees the protection of their constitutional guaranty are that they are guilty of laches or subject to estoppel. The reasons for such finding are, first, that the bill was not filed until two years after the City began the construction of the dam; secondly, that there had been negotiations between the parties to the action.

The facts by the record are that the cause of action was not the building of the dam or the use thereof for lawful purposes. The City for many years, according to the testimony, had owned and maintained other structures, including another dam in the immediate neighborhood and on the same river, but had not used the same for unlawful diversion. The cause of action in this case was the threatened unlawful use of this particular dam for the purpose of taking all the water. As to the negotiations, the testimony shows that all negotiations *prior to the filing of the bill* were negotiations of sale and price conducted on notice by complainants' attorney to the city officials that complainants denied all power in the City to coerce them or to take their property in any way save by purchase at a price acceptable to them, and on further notice to and understanding by the City that the complainants relied on the remedy of injunction in the Federal Courts for their ultimate protection.

As to the negotiations after the filing of the bill, even conceding they were based on any theory of settlement or compromise, or of reasonable compensation, it is inconceivable that they could afford any ground for laches or estoppel, *for the bill was filed.* Furthermore, the negotiations after the filing of the bill were conducted under a stipulation appearing in the record that nothing that complainants' attorney stated should be taken against his cli ents in the event of litigation. Yet this Court has

found laches because of the "two years" and estoppel because of the negotiations.

THE CITY, FROM THE BEGINNING OF THE CONTROVERSY, UPON ITS OWN KNOWLEDGE OF THE FACTS AND UPON THE PLAIN RECORD OF THIS CASE, HAS IN EQUITY AND GOOD CONSCIENCE CONCEDED THAT GROUNDS FOR LACHES OR ESTOPPEL DO NOT EXIST IN THE CASE.

Thus, former Corporation Counsel Scott, when he drew the City's answer, refrained from making any claim of laches or estoppel, and even alleged that the dam complained of was nowhere near completion (see Record, fol. 16).

During the progress of the litigation the City officials, in their discussion of the case with complainants' counsel, never questioned but that the complainants had been prompt, energetic and persistent in their assertion and defense of their rights, and neither neglect, delay or indirection of any kind was ever formally or informally charged against the complainants.

Corporation Counsel Whalen, who succeeded Mr. Scott in 1898, was represented in the conduct of this case by his assistant Mr. Sterling. Mr. Sterling argued the case for the City in the United States Circuit Court of Appeals, and knowing all the facts, after a full and most careful discussion in his brief and in his oral argument of the testimony and the record, made no claim of any grounds on which laches or estoppel could be based.

In or about December, 1901, the City's petition for a writ of *certiorari*, and its brief thereon, prepared by Mr. Whalen and Mr. Sterling, were filed in this Court. The petition thus summarizes the issues between the parties (see Petition, p. 7):

> "The City of New York is now, or in the
> "near future will be, in great need of an ad-
> "ditional supply of water, which it can get
> "only from certain streams. Several of

"these streams, however, although having "their origin in the State of New York, "eventually flow into other States, and if "citizens of those States can enjoin the di- "version of water from those streams, and "can in no manner be compelled to accept "compensation in damages, it would be im- "possible for the City of New York to make "use thereof. It thus becomes of great im- "portance to the City of New York that the "law shall be settled upon this question, and "upon the determination of this general law, "as I am informed and verily believe, de- "pends the policy that shall be adopted by "the said City in reference to its future water "supply."

The brief in this Court on said petition contains the following statement: "The matters involved are "of great importance to the City of New York and "its citizens because of their bearing upon other "projects for procuring an additional water supply. "If the opinion of the majority of the Court below "is correct, the City of New York is greatly re- "stricted as to its sources of water supply, and some "of the most available cannot be made use of be- "cause the streams flow into other States, and under "the principles of the decision below an injunction "would immediately lie to restrain such use."

"The vital questions in this case are novel ones. "It was conceded by counsel for both parties below "that no adjudication could be found that, if fol- "lowed as a precedent, was clearly decisive of the "present case. There is now pending, we are in- "formed, in this Court a suit between the States of "Colorado and Kansas, involving very similar ques- "tions to the ones now under consideration, and the "petitioners respectfully submit that this Court "should take into consideration their case as being "involved with or as a phase of the questions in "litigation in the Colorado and Kansas dispute."

It is well known to this Court that no question of laches or estoppel was involved with or was a phase of the questions in Colorado *v.* Kansas.

On or about the 1st day of January, 1902, Hon. George L. Rives succeeded Mr. Whalen as Corporation Counsel. In his brief filed for argument in this Court, Mr. Rives, after an exhaustive examination of the facts and the record, refrained from any claim of the existence of grounds for laches or estoppel.

After the argument in this Court the counsel for the appellees filed an additional brief devoted to a further consideration of the right to the flow of a non-navigable stream as a corporal hereditament or real estate. The City's counsel filed in reply a memorandum in which he again refrained from any reference to the question of laches or estoppel, and on page 3 thereof, under the statement "We recapitulate our argument as follows," gives the resumé of his argument, in which no reference is made to that question.

Petitioners therefore submit, that at the time of the argument of this case in this Court the counsel for all parties were agreed that an accurate knowledge of the testimony and the records would not justify a finding of laches or estoppel; and your petitioners submit that in view of this fact the finding of laches or estoppel made by this Court should not be made final, at leastuntil after this Court has heard argument touching the point of laches or estoppel, and for that purpose a reargument should be ordered by this Court.

Appellant's counsel disclaimed before this Court the existence of grounds for the finding of laches or estoppel.

Upon the argument of Mr. Rives for the appellant before this Court on the 25th day of February, 1902, one of the learned Justices was understood to ask him whether there was laches or estoppel in the case, and he was understood to reply that he knew

of no grounds therefor. Upon the argument of the appellees' counsel on the following day, Mr. Justice Brewer called the attention of appellees' counsel to the fact that the bill alleged that the construction of the dam had been commenced some two years before the filing of the bill, and asked whether in his opinion that bore at all on the complainants' right to equitable relief. To this the counsel for the appellees replied, Mr. Rives being present, that in his opinion the allegation referred to had no bearing on the right to equitable relief, and that the City set up no such claim. Said counsel then referred to the fact that during the said two years negotiations had been carried on between the parties, and for the character of these negotiations referred the learned Justice to the testimony in the record. That testimony we submit seems to have been overlooked or misunderstood by this Court.

Shortly after the question of Mr. Justice Brewer, the appellees' counsel concluded his argument. Mr. Rives replied at length but notwithstanding the suggestion of Mr. Justice Brewer, Mr. Rives set up no claim to laches or estoppel as in truth, in equity and good faith, the petitioners submit he could not.

The appellees have not been heard on the point of laches or estoppel.

Your petitioners submit that the Court is in error when, after a consideration of the cases referred to by it in its opinion, it says: "*It is, however, urged* "*that in all the cases referred to* the one party could "have appropriated the property or right of the "other by condemnation proceedings, and that as "he could have done so he should not be disturbed "for lack of those proceedings," &c., &c. (see opinion, p. 9).

Your petitioners submit that no such view was urged upon this Court; that the cases referred to were not mentioned in the brief of either counsel, nor referred to in the argument of the case before

this Court. This reference in the opinion of the Court to a discussion of these cases when no such discussion was had by counsel leads petitioners to believe that the Court has by inadvertence decided the case under the impression that argument had been heard upon a point which, in fact, had not been argued, and that cases had been discussed by counsel concerning which they have had no opportunity to be heard.

Petitioners submit that it is the function of counsel, through their pleadings, to frame or develop the issues for the decision of the Court. In our judicial system counsel are, like judges, officers of the court, and have rights and functions as well defined and as sacred as those which mark the judicial office.

Your petitioners submit that this Court, and all courts, are without power to decide an issue of fact that is not presented or developed by the pleadings, or an issue of law that is extraneous to the case as presented and delimited by counsel.

The limitation on the Court in this respect is the same as that which would preclude the court from taking jurisdiction of a mere controversy which was not brought into court and reduced to justiciable form. In both cases the judgment of the Court would be null and void, for it would be without jurisdiction.

Your petitioners do not mean to suggest that the Court may not discover, and of its own motion consider an issue in a case which counsel have overlooked, but your petitioners do assert that a court cannot properly pass upon such an issue until after it has ordered an argument thereon by counsel, or at least the submission of a brief. Otherwise we submit it would adjudge rights without having heard the parties.

It is conceded that laches or estoppel were referred to by appellees' counsel in his argument before this Court, but only when he commented on the case as free therefrom, once when he referred to the City's

answer and once again when he answered the question of Mr. Justice Brewer.

Reference to the absence of laches or estoppel there was, but no argument was made by appellees' counsel on the point of laches or estoppel for it was considered by him as he supposed it was conceded by the City's counsel that no ground existed therefor.

Counsel conceive now that the question of Mr. Justice Brewer as to the bearing of the allegation in the bill of the "two years," was asked by him under the impression that the cause of action and the decree of the United States Circuit Court all related to the construction and maintenance of the dam as unlawful and as creating the cause of action; but counsel submit that the question of the learned Justice was answered in accordance with the fact that the cause of action and the decree related only to the use of that structure for an unlawful purpose. In the latter aspect of the case, the fact that the construction of the dam was begun two years before diversion was threatened would, as appellees' counsel stated, have no bearing upon the right of the complainants to equitable relief. Complainants could not complain of the dam. What they could and did complain of was threatened unlawful diversion long before diversion was actually committed. So it appears from the bill, which alleges: "Your orators further aver that the defend-
" ant began about two years ago the building of a
" dam across the said west branch of said Byram
" River, about 500 feet north of the Connecticut
" line, and is now building said dam, and it is now
" near completion, and your orators *are informed*
" *and believe* that the said defendant *intends to di-*
" *vert* or cause to be diverted the water of said west
" branch or some of it, &c., &c."

The City, in its answer avers "that the *said dam*
" *is not completed*, or *near completion*, and will not
" prevent the natural flow of the said west branch
" of the Byram River for at least one year. It ad-

" mits that it *intends to divert* some or *all* of the " water of said west branch from its natural chan- " nel."

THE PETITIONERS NOW RESPECTFULLY SUBMIT THAT THERE IS NOTHING IN THE RECORD IN THIS CASE TO SUSTAIN THE FINDING OF LACHES OR ESTOPPEL, BUT THAT THIS COURT FOR THE REASON OF THE ABSENCE OF BRIEF AND ARGUMENT ON THE POINT INVOLVED HAS OVERLOOKED OR MISUNDERSTOOD THE EVIDENCE TOUCHING THE POINT OF LACHES AND ESTOPPEL IN THE LONG RECORD OF 238 PAGES, AND FOR THE SAME REASON HAS OVERLOOKED CERTAIN FUNDAMENTAL CONSIDERATIONS IN THE CASE TOUCHING THE SAME POINT, ALL OF WHICH COUNSEL DESIRE TO BRING BY BRIEF AND ARGUMENT TO THE ATTENTION OF THE COURT, TO THE END THAT THE DUE AND USUAL HEARING MAY BE HAD THEREON BEFORE THIS CASE SHALL BE FINALLY DECIDED.

The cause of action and the scope of the decree and injunction and the testimony are such as to exclude the laches or estoppel.

It is true that the bill prayed, in addition to the prayer that the City be restrained from diverting the stream, that the City be enjoined from completing the dam and maintaining it; but the cause of action and the *gravamen* of the bill were not the building of the dam, but the unlawful use of the same after it was built, for the purpose of unlawful diversion (*i. e.*, diversion at such times and to the extent that it would result, according to the common law, in depriving these complainants of their property—sensible, substantial diversion).

The decree of Judge Shipman in the United States Circuit Court and the injunction in effect recognized the dam in itself as a lawful structure, as the complainants concede it to be. The decree was obviously framed by the learned Judge with care to this

effect. The injunction and the decree did not order the removal of the dam or interfere with it in any way, except to forbid its unlawful use to deprive the complainants of their property, that is, it forbade unlawful diversion only, but left the City free, as in the nature of things and by the law it was free to take to any extent not amounting to technical diversion, *i. e.*, not sensibly and substantially diminishing the usual flow over the lands of the complainants and thereby depriving them of their property. The taking of flood waters would not necessarily be common law diversion and would not necessarily create a cause of action.

It is in evidence that the flow in the Byram River in the flood season is very great (sometimes sixty times as great), as compared with that of the dry season (see Complainants' Exhibit, Record, p. 193). The use of the water to a large extent in the flood season would not reach that point which the law regards as diversion and as creating a cause of action. But the testimony shows that the City intended to divert at all times, even in the dry season (see Record, fol. 164). That is the unlawful act complained of and the unlawful act which Judge Shipman enjoined.

In this connection the petitioners submit that it would seem that the Court has overlooked testimony supporting this view of the cause of action as taken by the complainants and by *the defendant* in their pleadings. Such is the testimony *introduced by the City*, at folios 407, 427, that there was no diversion until 1897, a year after the bill was filed. Testimony of a similar nature is given by the complainant Muller (fol. 349), and by the complainants' witness Johnson (fols. 344 and 372).

There are allegations by the City in its pleading, and there is testimony in the case of the complainants which negative the conclusion that the structure as a dam was notice that its purpose was unlawful diversion. Thus, the City alleges in its answer as follows: "Many years ago it (the City) took

" proceedings to acquire title to large quantities of " land in the County of Westchester to be used in " connection with the supply of water for the City " of New York, and it proceeded to construct, *and* " *is still constructing numerous dams*, aqueducts, " reservoirs and other structures necessary for the " said supply of water, and has expended upwards " of thirty millions of dollars in providing for said " water supply for the residents of the City of New " York. It admits that, among other things, it is " building a dam across the west branch of the " Byram River in the State of New York, and a " short distance from the boundary line between " that State and the State of Connecticut, but it " avers that the said dam is not completed nor near " completion and will not prevent the natural flow " of said west branch of the Byram River for at " least one year."

It is, therefore, conclusively proved by the City's own assertion that for many years the operations of the City in the immediate neighborhood, and near the boundary line, had been of a very extensive character, covering a number of dams and other structures to which, so long as they were put to a lawful use or to a use not affecting the rights and property of complainants, they could not and did not object.

It is in evidence that among these structures was another dam close to the dam in question, on the same river, a few miles above, at the outlet of Byram Lake, of which the City acquired the ownership in 1884, and which, from that time on, it had owned; but that while this dam had been owned by the City since 1884 as it had owned other structures in connection with its water supply, it had never been used for unlawful diversion, as was to be the case with the dam in question. The testimony of the witnesses Birdsall, Johnson and Vail conclusively proves this point. (See fols. 140, 155, 157, 160, 162, 165, 166, 369, 381 and 547.)

Petitioners therefore submit that any conclusion

that the dam was in itself notice to complainants of intended unlawful diversion is shown to be contrary to allegations in the City's pleading and negatived by the testimony.

The testimony as to the negotiations does not warrant the inference that petitioners had in any way consented to the taking of their property but were merely negotiating as to damages.

The petitioners show that the Court in its opinion states as follows: "It is true, the testimony discloses "that the plaintiffs and the City had been trying to "agree upon the amount of compensation, but that "shows that the plaintiffs were seeking compensa- "tion for the injuries they would sustain and were "not insisting upon an alleged right to an abandon- "ment of the work."

We submit that the testimony does not show that the plaintiffs were seeking compensation for the injuries they would sustain; that the testimony shows that the negotiations *prior to the filing* of the bill were strictly and avowedly as to at what price, if any, the complainants would consent to sell their property, and were conducted with notice to the City and a fair understanding by it that the plaintiffs and their counsel claimed that there was no way in which the City could condemn the property and take the water, and that eventually the United States Courts would enjoin the City from taking it until it paid their price.

All the statements made in the minutes of the conference, from which it could be inferred that the plaintiffs were seeking compensation in the way of *damages* and would deal with the City in any way of *compromise* were made at the date of the conference (April 28, 1897), over a year after the filing of the bill; relate entirely to the time at which they were

made (*i. e.*, a year after the bill was filed) and were made under the stipulation appearing in the record (at fol. 76), that any statements made would be regarded as made in an effort to arrive at a settlement without litigation and would not be used against complainants in the event of litigation.

There is further testimony to which the attention of the Court should be called. Prior to the filing of the bill the City had made no effort to settle with the complainants (fol. 84).

While an analysis of the testimony on the point of these negotiations is more properly left until the rehearing which it is prayed that this Court will grant, yet, in view of the circumstances it may be well to point out the precise character of the testimony in respect to the alleged negotiations. All the testimony on this point is contained in folios 70 to 114 of the Record, in minutes of the conference already referred to. This was a conference held April 28, 1897, between Commissioner of Public Works Collis, Chief Engineer George W. Birdsall, for the City, and Stephen G. Williams for the Byram River property owners. Two points must be considered. First, the negotiations before the filing of the bill (if the proceedings which took place prior to the filing of the bill between the parties to the suit can be called negotiations); and, secondly, negotiations or proceedings between the parties after the filing of the bill. It is submitted, that the character of all discussions and transactions between the parties after the filing of the bill cannot affect the question of laches or estoppel in this case, for the bill was filed, the "*lis pendens*" was of record and everything that passed between the parties to the action thereafter was subject thereto, and the complainants' rights were fully protected thereby. The bill repudiated the idea of damages and demanded injunction as the complainants' absolute right. The minutes of the conference indicate clearly the character of the pro-

ceedings, or so-called negotiations, between the parties prior to the filing of the bill.

The following is the statement given by Mr. Williams on the 28th of April, 1897, at the conference about a year after the filing of the bill, as to the nature of what had transpired between the parties to the controversy before the filing of the bill: "No "effort had been made on the part of the City to "make any settlement with any of the property "owners whom I represent. The City has deliber- "ately attempted to take property belonging to my "clients, who are citizens of another State and "whose property is in another State. I have made "in behalf of my clients, as Mr. Birdsall knows, and "will, I am sure, corroborate me, a number of "efforts *during the past two years or more* to obtain "a settlement of some kind with the City, apd I have "repeatedly stated to Mr. Birdsall, to the Corpora- "tion Counsel, and endeavored several times to make "the statement to General Collis but never could "get hold of him; that I was endeavoring to persuade "my clients to accept something like a reasonable "sum urging upon them the fact that it was more or "less a necessity for the City although the City could "have taken the water from some other place, but "that if the City were approached in a fair way it "would deal liberally with them; that there was no "way in which the City could condemn the prop- "erty and take the water, and that eventually the "United States Courts would enjoin the City from "taking it until they paid or settled in some way. "And it was not until I found my patience ex- "hausted that I was prepared to advise them, or "any of them, to begin their action for injunction."

This is the entire testimony covering the nature of what passed between the City and the complainants prior to the filing of the bill. Mr. Williams' expression is, "during the past two years or more." The period of two years would antedate the filing of the bill by about a year. But Mr. Williams goes further than that and says, "during the past two

years or more," and it is submitted, in any spirit of fairness this expression carries the testimony back to the inception of the controversy.

This testimony is clear and precise to the effect that the City had made no efforts to settle with or buy the rights and property of the complainants, and this in the face of unqualified statements made by the complainants' solicitor to the City officials of the absolute nature of their rights and of their unqualified intention to enforce those rights if the City used the claim for diversion without acquiring complainants' rights. Everything else that passed between the complainants' solicitor and the City officials at this interview, in which a settlement between the parties is discussed or wherein the situation between them is referred to as involving a question of damages or compensation as distinguished from price, is said after the filing of the bill and relates only to a period after the filing of the bill; and furthermore, was protected by an express stipulation made by Mr. Williams and expressly assented to by the City officials (fol. 76), that any statement made by him at the conference would be regarded as made in an effort to arrive at a settlement without litigation and would not be used against his clients in the event of litigation. The title of this document comprising the minutes of the conference, to wit: "Minutes of a conference in the matter of "claims by owners of property on the Byram River, "in the State of Connecticut for damages, &c.," must necessarily be limited to the period after the filing of the bill, that is, to the date of the minutes, which is stated in direct connection with its title on page 24 of the Record, April 28, 1897, over a year *after* the filing of the bill.

IT IS, THEREFORE, CLEAR THAT THE COMPLAINANTS FILED THEIR BILL ONE YEAR BEFORE THERE WAS ANY DIVERSION, PRAYING FOR AN INJUNCTION UPON THE GROUNDS OF FEAR AND APPREHENSION; THAT FOR THE TWO YEARS BEFORE THE FILING OF THE BILL THE CITY HAD BEEN FORMALLY AND REPEATEDLY

ADVISED OF THE COMPLAINANTS' RIGHTS, AND OF THEIR INTENDED RECOURSE TO THE FEDERAL COURT FOR AN INJUNCTION IF THE CITY DIVERTED; THAT THE CITY HAD REFRAINED FROM EVERY EFFORT TO SETTLE; THAT NOTHING WAS EVER SAID BETWEEN THE PARTIES TO THE CONTROVERSY IN RESPECT TO A SETTLEMENT FOR DAMAGES UNTIL AFTER THE BILL WAS FILED, AND THEN UNDER A SOLEMN STIPULATION THAT THEIR CONSIDERATION OR DISCUSSION OF DAMAGES SHOULD NOT BE TAKEN AGAINST THEM IN THE EVENT OF LITIGATION. IN A WORD, THE PARTIES HAD STATED, AND AS IT WERE, AGREED, UPON THEIR ISSUES OR DIFFERENCES, AND THE COMPLAINANTS HAD FILED THEIR BILL A YEAR BEFORE THEIR RIGHTS WERE ACTUALLY INVADED. CAN IT BE THAT THEREBY THEY HAVE LOST THEIR RIGHTS BECAUSE OF LACHES?

We submit that the following statements in the Court's Opinion are not supported by the record and the testimony.

At page 4 of the printed opinion, the following statement is made by the Court:

"If the plaintiffs had intended to insist on the "strict legal rights, which, for the purposes of this "case we assume they possessed, they should have "commenced at once and before the City had gone "to expense, *to restrain any work by it.* It would "be inequitable to *permit them to carry on negotia-"tions with a view to compensation* until *the City "had gone to such great expense* and then failing to "agree upon the compensation, fall back upon the "*alleged absolute right to prevent the work.* If "they had intended to rest upon such right and had "commenced proceedings at once, the City might "have concluded *to abandon the proposed under-"taking* and seek its water supply in some other "direction. If this injunction is permitted to stand, "the City must pay whatever the plaintiffs see fit

"to demand however extortionate their demand "may be or else *abandon the work and lose the* "*money it has expended.*"

The complainants could not properly be said to seek *to restrain any work* by the City, nor was it within the scope of the decree and injunction to do so.

The evidence shows that *no* "negotiations with a view to compensation" were carried on until after the bill had been filed, when no inequitable result could flow therefrom, as the bill disclosed the claimants' position, and that the negotiations (if they may be called so) before the bill was filed were not on the theory of reasonable compensation or settlement, but were of price or sale, and therefore could not have misled the City.

There is no testimony in the record showing that "the City had gone to such great expense." The City avers that at this time the dam was not near completion. The testimony shows that the Twenty-third and Twenty-fourth Wards of New York are supplied with water from four sources (see Record, fols. 542-546). The large amounts expended by the City were not expended exclusively at the Byram River dam, but on the City aqueducts, &c., through which other waters than those of the Byram River could be and is conducted, to wit, the waters of Kensico Lake, Bronx River and Rye Lake (see Record, fol. 143; fols. 542-546).

The complainants had *not* "alleged absolute right "to prevent the work."

There was *no necessity* in the event of an injunction that the City should "abandon the proposed undertaking" and there is *no proof* that abandonment would be necessary.

There is *no testimony* to sustain the view that the City, in the event of failure to buy from the plaintiffs, must "abandon the work and lose the "money it had expended."

On page 5, the Court quotes from the opinion of

Circuit Judge Shipman a proposition of law laid down by him and then says:

" However true that proposition may be generally " when invoked *at the inception and before any* " *work has been done*, we think it not applicable " when the plaintiffs *have waited until the work has* " *been progressing for two years and the defendant* " *has expended a large sum of money thereon.*"

But the cause of action was common law diversion and not the construction of the dam, and further there was no testimony in the case showing that a large sum of money had been expended on construction at the time the bill was filed.

Similar considerations apply to the reference on page 11 to the " conditions which exist after de- " fendant has proceeded *in the completion* of its " proposed work and *has expended a large sum of* " *money therein.*"

On page 2 of the opinion the Court states:

" *It also appeared that several thousand people in* " *the City of New York were dependent upon this* " *water supply.*"

The only testimony on the point referred to is contained in folios 542–546 of the record, and that testimony is to the effect that the Twenty-third and Twenty-fourth Wards of the City of New York are dependent upon a supply of water from four sources, known as the Kensico, Bronx, Byram and Rye supplies, to which the Byram supply contributes only about seven-twentieths.

This being the case, it can hardly be said that several thousand people are *dependent* on the Byram River supply.

We submit to the Court whether the authorities cited sustain the conclusions arrived at.

This case is an interstate case. All the cases cited by the Court are State cases, as distinguished from interstate cases.

In this case there had been neither prior assent nor subsequent acquiescence on the part of the complainants; on the contrary, there was prior protest and subsequent contest, and both protest and contest *before* diversion. All the cases cited are cases of prior assent or subsequent acquiescence.

In this case the property taken was real estate in Connecticut; the aggressor was a corporation of New York. The taking was for a public purpose in New York as distinguished from a public purpose in Connecticut. In *every* case cited by this Court the property taken, the corporation-aggressor and the public purpose all belonged to and were located in one State. (Or the corporation was a Federal corporation, having within the State the status of a State public corporation.)

In this case the wrong done was the taking of property—real property—without due process of law, without even color of law or authority, without any right of eminent domain.

The cases cited by the Court are either damage cases, to wit, consequential injuries, or breach of contract, as distinguished from the wrongful taking of property; or are cases of the taking of property under eminent domain, under color of law, or in virtue, as the Court has expressed it, of some "ultimate right to do the act sought to be restrained."

In this case the defendant had been operating for many years in the neighborhood of the complainants with dams and other structures, some on this very river, with no resulting injury to complainants, so that the construction of another dam was not *per se* notice to complainants of an intent to divert all the water.

The cases cited by the Court are cases where the acts of the defendant were *per se* inconsistent with the rights claimed by the complainants, and therefore notice to them.

In this case the structure was obviously useful for purposes not injurious to complainants, and therefore was not *per se* notice that it was to be used for

purposes injurious to them. There can be no presumption that a structure having a lawful use is to be used for an unlawful purpose.

The cases cited by the Court are cases where the structure was obviously useful only for a purpose necessarily injurious to complainants.

In this case no grounds for laches or estoppel were pleaded, and the same were not urged in brief or argument. In all the cases cited by the Court the issue of laches or estoppel was presented by the pleading or urged in the briefs of counsel, or inhered in the very nature of the question presented.

Annexed hereto is a consideration of the cases cited by the Court, showing in some detail wherein they are inapplicable.

Petitioners further show that the Court in its opinion, at pages 9 and 10, refers to the case of *Pappenheim* vs. *Met. Elevated Railroad*, 128 N. Y., 436. This case was submitted in the brief of appellees' counsel in this Court as stating the law of New York, and showing that where, as in this case, the taking is without legal right or color of law, the injunction must issue without any condition or alternative provision that in lieu of the injunction the complainants should take damages. In other words, that in such a case there is an absolute right to the injunction which a court of equity cannot withhold. This Court in its opinion says: "It was "suggested in the Pappenheim case, *supra*, 'that "'in cases where the owner wishes to actually stop "'the further trespass, and *where the defendant* "'*has no legal right to acquire the property*, such "'condition would not be inserted, and the injunc-"'tion would issue upon the right of the owner "'being determined.'" This Court then makes the following statement: "But the ruling of *this* Court "has been to the contrary, at least, in cases where "there has been delay on the part of the plaintiff "in commencing suit." To sustain this assertion this Court cites two cases, and only two, to wit: *Osborne* vs. *Missouri Pacific Railway Company*,

147 U. S., 248; *McElroy* vs. *Kansas City*, 21 Fed. Rep., 257.

Petitioners submit that an examination of these cases does not show that this Court has ruled to the contrary of the statement of law in the Pappenheim case quoted above; but discloses that the facts in the Osborne and McElroy cases were such that they afforded no grounds for any such ruling by this Court, and are not applicable to the case at bar.

The statement of the law of the injunction absolute in the Pappenheim case limits its use expressly to cases where "the defendant has no legal right" to do the act complained of, *i. e.*, to cases where the injunction is sought in defense of a strict legal right in the complainant. But in the Osborne and McElroy cases the defendant had the legal right to do the act complained of, and the injunction was not in defense of a legal right but of a qualified and mere equitable right. In the Osborne and McElroy cases the cause of action was not the taking of property as it is in this case, but consequential injury, for which damages and damages only were ultimately the only remedy under the express provisions of the constitution of Missouri.

The Osborne case was a case of consequential injuries to property adjoining the right-of-way of a railroad. The McElroy case was a case of consequential injuries to property adjoining a street which the defendant, a municipality, was grading in a way injurious to complainant, as owner thereon. Both cases were Missouri cases. The Missouri constitution provided that private property should not be taken or *damaged* for public use without just compensation. In the Osborne case the statute of Missouri conferring upon the railroad the right of eminent domain was defective in omitting to provide a method for assessing damage to property by way of consequential injury. In the Osborne case the injunction was refused obviously because the cause of action was consequential injury, and dam-

ages the ultimate, and, it may be said, the only remedy.

In the McElroy case the injunction was granted, but made dependent on ascertainment and payment of damages Mr. Justice Brewer, writing the opinion, expressly limited the alternative or conditional injunction therein granted to cases where "the de- "fendant had an ultimate right to do the act sought "to be restrained." This is just the right which the defendant in the petitioners' case has not got.

Petitioners submit that the Osborne and McElroy cases are not in conflict with the rule expressed in the quotation from the Pappenheim case (*supra*); which rule is the rule of property law both in Connecticut and New York by an overwhelming line of judicial authority and precedent, and which as a rule of property these complainants, as land owners in Connecticut, have a constitutional right to have applied for their protection in this case.

See

Jackson *v.* Chew, 12 Wheaton, 153.
Burgess *v.* Seligman, 107 U. S., 20.
And Appellee's brief on hearing in this court, p. 47.

Moreover, the case at bar is unlike the cases cited in that it is not an ordinary equitable case to enforce an equitable right, but is a *case in equity* to enforce a *strict legal right*. It is sought to prevent the taking of property, to enforce the petitioners' constitutional guaranty. It is fundamental and elementary in riparian law that the equitable action for an injunction in a case of a diverted water course is an equitable action to enforce a strict legal right (see Spelling on Injunctions, Vol. 1, §§ 304, 305, 2d Ed.).

The Court, in its opinion in the Pyne case, page 3, says that it assumes, among other things, "that "the plaintiffs have a *legal* right to the natural "flow of the water through their farms in the "State of Connecticut, and *cannot be deprived* of "that right by and for the benefit of the City

"of New York by any legal proceedings either "in Connecticut or New York; and that a court of "equity at the instance of the plaintiffs, at the in- "ception and before any action had been taken by "the City of New York would have restrained all "interference with such natural flow of the water." This assumption is that the complainants had an absolute *legal* right; that the nature of that right was such that it was to be secured through an injunction suit in equity, but that owing to the laches of the complainants the injunction must be denied.

But it is fundamental in the law as expounded by this Court through its long history and as confirmed by repeated decisions and opinions of Justices now on this bench:

THAT WHEN AN INJUNCTION IS SOUGHT IN AID OF A LEGAL RIGHT THE COURT IS BOUND TO GRANT IT, AND LACHES IS NOT A BAR IF THE LEGAL RIGHT IS ESTABLISHED.

This Court said in Menendez *v.* Holt 128 U. S., 523:

"Mere delay or acquiescence *cannot* defeat the "remedy by injunction in support of the legal "right, unless it has been continued so long and "under such circumstances as to defeat the (legal) "right itself."

And in Saxlehner *v.* Eisner Co., 179 U. S., 40, and in Menendez *v.* Holt, *supra*, this Court cited and quoted from one of the leading English cases on this fundamental principle of law (Fullwood *v.* Fullwood, L. R. Chan. Div. IX., 176), the expression of which case is (by syllabus):

"When an injunction is sought in aid of a legal "right, the Court is bound to grant it if the legal "right is established. Therefore, mere lapse of "time will not be a bar to the granting of the in- "junction, unless it would be a bar to the legal "right."

Prof. Pomeroy in his Equity Jurisprudence, 2d Ed., Vol. II., § 817, says:

"The equitable remedy to which this *quasi* estoppel by acquiescence most frequently applies, is "that of injunction, preliminary or final, when "sought by a proprietor to restrain a defendant "from interference with easements, from committing nuisances, from trespass, or other like "acts in derogation of the plaintiff's proprietary "rights. This effect of delay is subject to the important limitation that it is properly confined to "claims for purely equitable remedies to which the "party has no strict legal right.

"Where an injunction is sought in support of a "strict *legal* right the party is entitled to it if his "legal right is established; mere delay and acquiescence will not therefore defeat the remedy unless it has continued so long as to defeat the right "itself."

Petitioners submit that this statement from Prof. Pomeroy's treatise should be considered in qualification of the quotation from his work made by this Court in its opinion, page 4.

Petitioners, therefore, submit that in its opinion in this case, the Court expressly assuming that this action in equity is for the protection of a strict legal right, then proceeds to apply the rule of laches in contradiction to the authorities and contrary to the express decisions of the Court

Counsel submit that the cases cited by the Court should be reconsidered on brief and argument of counsel, and applied to this case, if at all, only after the due and usual hearing.

Lastly, petitioners submit that the character or status of the City of New York as a corporation as to these complainants and their real property in Connecticut is that only of a private corporation. Whatever may be the rule as to estoppel, the doctrine of laches implies some duty or obligation on

the part of the person against whom it is applied. Between the citizens of a State and that State or a corporation to which that State has lent its power of eminent domain, such duty or obligation may exist; but between the citizens of one State and a corporation, whether public or private, of another State, if the use it serves is limited to the other State, no such duty or obligation exists.

Therefore, before the doctrine of laches can be applied in this case, it must be determined that the City of New York is as to these complainants and their property a public corporation. This the Court has not done. On the other hand, it appears that the Court proceeds upon the contrary assumption.

The Court assumes that the City of New York is in this case a private corporation, for in its opinion, at page 9, it says: "We start in this case with the "assumption that there was no power in the City "of New York, by any proceeding in the States of "New York or Connecticut, to acquire the right of "appropriating this water and thus depriving the "plaintiffs of its continued flow." But the Court then proceeds to apply the doctrine of laches, and this, too, upon the authority of cases where the corporation was a public corporation discharging a public use as to the property rights involved and possessed of an ultimate right to take those rights. This is true of all the cases cited by the Court, and especially of the Osborne and McElroy cases.

The power of eminent domain implies the ultimate power of the corporation to take, and it implies equally the ultimate obligation of the property owner to surrender for an award of damages. In the Pine case there is in the City no ultimate right to take, and therefore there is no ultimate obligation in the complainants to surrender for an award of damages. Where there is the ultimate right of eminent domain, delay or acquiescence on the part of the owner is often fatal to his qualified right of ownership, because of his ultimate obligation to surrender his property for an award of damages;

but where there is no right of eminent domain then the right of ownership is not qualified but absolute. There is no ultimate obligation. Delay is not fatal, and even acquiescence does not bar the equitable remedy unless so extended that the legal right itself is lost—as through fraud or the Statute of Limitations.

The point touching the status of the City of New York as to the complainants and their property is one not only of importance in this case, but of vast importance to the law of private property generally. If a corporation of one State, charged with a public use purely local to the State of its creation, is to be treated in any respect as having the status of a public corporation as to the citizens of another State and their property, then it must be true that citizens of the various States and their property are subject to an extraordinary burden of public uses, the existence of which has never been suggested until the decision in this case. Citizens of each State and their property, it has always been known, are subject to public uses as to Federal corporations and as to corporations of their own State, but beyond this they have never borne any burden nor sustained any obligation of public uses. And petitioners submit, that it would be an intolerable addition to the burden of citizens and of their property in respect to so-called public uses, if in addition to protecting themselves and their property from the public corporations of their own State, they should be obliged to watch the operations and defend their property rights against the aggressions of every corporation in the forty-six States of the Union which may be created by its particular State under some theory of public use therein. Every industrial corporation or trust created by a State to purvey to its citizens the necessaries of life in which it traffics would be as to the citizens of the other States, their property and their rights, a public corporation. Your petitioners submit that this Court cannot intend so to extend the doctrine of public

uses and the burdens of private property. It therefore becomes a matter of signal importance, not only to this case but to the law generally, that the defendant in this case shall be held to be a private corporation and the doctrine of laches limited accordingly.

And now because of the matters and things above stated the petitioners do respectfully pray the Honorable Justices of this Court to grant a rehearing in this case.

SAMUEL PINE,
FREDERICK MULLER,
Petitioners.

WHEELER H. PECKHAM,
CHARLES C. MARSHALL,
STEPHEN G. WILLIAMS,
Counsel.

NEW YORK, May 15, 1902.

Certificate.

The undersigned do certify that the foregoing petition for rehearing is made in good faith and not for purposes of delay, and that in our opinion said petition is well grounded in the law and in the evidence and record in the cause.

WHEELER H. PECKHAM,
CHARLES C. MARSHALL,
STEPHEN G. WILLIAMS,
Counsel.

APPENDIX.

A FURTHER CONSIDERATION OF THE CASES CITED BY THIS COURT IN ITS OPINION TOUCHING THE POINT OF LACHES OR ESTOPPEL.

Galliher *vs.* Cadwell, 145 U. S., 368:

This was a bill filed by Galliher to quiet title arising out of the Homestead Entry Laws. Here the land in question was within the neighborhood of the claimant Galliher. The entry of Cadwell was under color of law as to the property and as to the claimant, to wit: a patent from the United States. The only question was whether Galliher had an equity superior to the legal title of Cadwell. The Court held that whether she had or not the title of Cadwell having its inception under color of law, Galliher was estopped. At page 372 of the opinion Mr. Justice Brown says, in part, "They (the cases) proceed on "the assumption that the party to whom laches is "imputed has knowledge of his rights and an ample "opportunity to establish them in the proper forum; "that by reason of his delay the adverse party has "good reason to believe that the alleged rights are "worthless or have been abandoned."

In the case of Pine against the City the party to whom this Court has imputed laches brought suit a year before their rights were really invaded, on information and belief as to what the city intended to do, and the city knew that the alleged rights were not worthless, and knew they had never been abandoned.

Roberts *v.* Northern Pacific Railroad, 158 U. S., 1:

This was a bill by the railroad company to quiet title. The opinion was by Mr. Justice Shiras, who bases the case, certainly in part, upon the fact that

the railroad was for a public and national purpose and under the Federal law had the right of eminent domain and a public use and purpose, notwithstanding the fact that the law of Wisconsin, through which State the railroad ran, denied to the railroad, as such, a power of eminent domain and a public use and purpose (see Opinion, pp. 19 and 25).

The Court in its opinion limits the case as follows: "It is well settled that where a railroad company "*having the power of eminent domain*, &c., &c."

Penn Mutual Ins. Co. *vs.* The City of Austin, 168 U. S., 685:

This was in fact a case of breach of contract by the City of Austin, in Texas, acting under statutes of that State. On the theory that the statutes impaired the obligation of the contract the complainant asked for an injunction, which was refused. It is to be observed that the case being essentially one of breach of contract, damages in the theory of the law were the ordinary and effectual remedy. Whereas, in the case of Pine against New York damages are not the ordinary and effectual remedy, for the complainants seek the return of their real estate and by the law of Connecticut, where it lies, they are entitled to its return and to the remedy of the injunction therefore.

The Penn case is further distinguished from the Pine case in that the act of the City of Austin in the construction of competing water works was done under a statute of eminent domain—due process of law as to the rights and property affected—and *therefore* was done by the city in virtue of an ultimate right in the city to take the property and in virtue of an ultimate obligation on the complainants to accept damages.

Northern Pacific Railroad Company *v.* Smith, 171 U. S., 260:

The same considerations apply to this case as are expressed above in respect to the case of Roberts *v.*

Northern Pacific Railroad, on the authority of which it was decided.

Provolt *v.* Chicago R. I. & P. Railroad, 57 Mo., 256:

A quotation from the opinion of the Court in this case will show its inapplicability to the case at bar: "The plaintiff did not attempt to obstruct or in any-" wise impede the progress of the work. The plain " inference was that he waived his right for repay-" ment of his damage, and only intended to follow " his remedy on his judgment. His conduct surely " led the company (defendant) to believe such was " his purpose, and induced them to pursue a course " and expend large sums of money which otherwise " they would not have done. If plaintiff intended " to rely on his rights and make present payment a " condition precedent, he should have objected and " forbidden the company (defendant) to interfere or " to do any work on his land till the question of " damage was settled. But this he did not do."

In the case of Pine against New York, as already pointed out, the plaintiffs could not impede the progress of the work. Up to the time of the filing of their bill no trespass had been committed by the City in which they could acquiesce or the consequences of which they could waive. The dam under construction, like the other city dams in the vicinity, was lawful until it was put to an unlawful and unusual use. At that time, and at that time only, could the complainants complain, and then only did their right to an injunction arise. It is obvious that no Court could have enjoined the City from proceeding with the construction of a dam. Its right to do so was presumably as good as that of any riparian owner on the Byram River.

Furthermore, in the Pine case there could be no inference that the plaintiff waived his right for the prepayment of his damages, since the testimony shows that in all the time that elapsed prior to the filing of the bill the plain relation between him and

the City was that of vendor and vendee; that the right in the vendor to charge what he pleased was fully asserted by him, but it did not need assertion. The testimony is clear to the effect that the City never did offer the vendor his price, but has deliberately proceeded to put the dam to an unlawful purpose and to strip the complainants of their property.

Charleston Railway Company *v.* Hughes, 105 Ga., 1:

Petitioners deem it sufficient to submit that this case in the lengthy quotation made from it by the Court in its opinion, so far from being against your petitioners, is pointedly in their favor. Petitioners reprint here so much of the opinion of the Supreme Court of Georgia as is quoted by this Court in its opinion (p. 7) with the particular words therein underscored which make the Charleston case an authority for the contention of petitioners rather than for the conclusions of this Court. In a parallel column are counsels' comments on the passages underscored:

"When a railroad company, without warrant or authority, enters upon the land of another, it is as a general rule no less a trespasser than any other person who is guilty of an act of a similar nature. If, however, a railroad company enters upon the land *with the consent of the owner, or under license from him,* and the property thus taken possession of becomes such a necessary component part of its railroad that to sur-

In the Pine case there was no consent and no license, but prohibition and warning.

render its possession would interfere seriously with the interests of the company, the landowner, although entitled to compensation for his property, might by his conduct in allowing *the entry upon his land* and permitting the company to so use it as that it could not be abandoned without great prejudice to its rights, estop himself from asserting against the company the legal title to the property by an action of ejectment. The propositions above stated are simply the application of familiar principles of law which *govern in all transactions of the character above referred* to, whether the controversy be between natural persons alone, or between such persons and corporations, and whether the corporation be public or private. A railroad corporation, *being one charged by the law with the performance of certain duties to the public*, is allowed, under some circumstances, to set up rights connected with the land over which it operates its line or rail-

In the Pine case there was no entry, no invasion of complainant's rights until one year after the bill was filed.

In the Pine case the City was not charged with any such duties. Public duties in New York are not public duties in Connecticut nor as to real estate there.

way, of which an individual or an ordinary private corporation would not generally be allowed to avail itself. Controversies in reference to possession of land, *where the rights of individuals only are involved, are purely matters* of private concern. Controversies in which a *corporation charged with the duties incumbent upon carriers of passengers, freight and* mails in which an effort is made by private individuals or others to take away from such corporation a part of the property in its possession, which is absolutely essential to its complete performance *of the public duties required of it,* become matters of more than private concern, and in which the public is deeply and seriously interested. *For this reason it has become settled law that the harsh remedies which would be allowed to one individual against another* in reference to the possession of land *will not be allowed to one* who is seeking to *recover such property from a railroad com-*

In the Pine case it is only the rights of individuals, that is, private parties, that are involved. Hence the controversy is one purely of private concern.

In the Pine case no public duties existed.

In the Pine case exact justice can not be done save by granting the injunction, nor can substantially the same rights be secured. The complainants demand their property and their right to it is a constitutional right.

pany, when exact justice can be done to such owner by giving him remedies which are less severe in their nature, and by which he would secure *substantially the same rights*, thereby saving to the public the right to require a performance of the public duties incumbent upon the corporation whose property is the subject matter of the controversy. That a railroad corporation has a right to deprive a person of his property for its uses by doing acts which in an individual would be dealt with as a trespass is not contended for; but when a railroad company enters upon land and constructs its road without lawful authority, and the *landowner acquiesces in* the wrongful act and the consequent appropriation of the property to a *great public use* until the same has become a necessary component part of the property required by the railroad to perform its *public duties*, such landowner will be held to have waived his right to retake the property, and will be re-

In the Pine case the owners did not acquiesce.

There were no public uses and no public duties.

mitted to such other remedies for the wrong done him as will not interfere with the *rights of the public* to have the railroad maintained and operated."

There were no rights of the public.

Atlanta, K. & N. R. Co. *v.* Barker, 105 Ga., 534:

Here the complainant had contracted with the Railroad Company to sell a right of way over his property, and had received part of the purchase money. Because the balance was not paid he sought ejectment. But the Court thought, in view of the contract, his remedy was an action for the balance. The case is placed entirely upon the fundamental or ultimate right of the Railroad Company to take the property for compensation (p. 538), and upon the prior assent and subsequent acquiescence of the landowner (p. 539).

Chicago, B. & Q. Railroad Company *v.* Ingelhart, 57 Neb., 444:

Here ejectment was refused because there was prior assent and subsequent acquiescence, and because the Railroad Company had the right of eminent domain and the status of a corporation charged with a use or purpose public as to the rights which it invaded.

Concerning the case of Osborne the only authority in this Court cited to sustain the proposition that the absolute, as distinguished from the alternative, injunction will be granted in those cases where the defendant has no legal right to acquire the property. (see Pappenheim's case, opinion, p. 10).

Osborne *v.* Missouri Pacific Railway, 147 U. S., 248:

This case is more fully discussed in the petition. It suffices to note here that Chief Justice Fuller in

treating the doctrine of laches or estoppel as applicable to this case, bases it upon the existence in the case of the power of eminent domain in the defendant. "*Whenever*," he says, "*the power of eminent* "*domain is* about to be exercised without compli- "ance with the conditions upon which the author- "ity for its exercise depends, courts of equity are "not curious in analyzing the grounds on which "they rest their interposition.

"*Equitable jurisdiction may be invoked in view* "*of the inadequacy of the legal remedy where the* "*injury is destructive or of a continuous character* "*or irreparable in its nature; and the appropriation* "*of private property to public use under color of* "*law, but in fact, without authority is such an in-* "*vasion of private rights as may be assumed to be* "*essentially irreparable, if indeed relief may not be* "*awarded, ex debito justitiæ.* But where there is "no direct taking of the estate itself in whole or in "part, and the injury complained of is the infliction "of damage in respect to the complete enjoyment "thereof, a court of equity must be satisfied that "the threatened damage is substantial and the "remedy at law in fact inadequate before restraint "will be laid upon the progress of a public work. "And if the case made discloses only a legal right "to recover damages rather than to demand com- "pensation, the Court will decline to interfere."

In the Pine case equitable jurisdiction is invoked, as the learned Chief Justice says it may be, because the injury is destructive, of a continuous nature and irreparable; because private property is taken, not for a public use, but for a private or foreign use, and under no color of law. There is a direct taking of the estate itself. The threatened damage is substantial, and the remedy at law is in fact inadequate as the Courts of Connecticut where lies the real estate taken, have declared, for the legal remedy does not restore the property.

The case of McElroy *v.* Kansas City, 21 Fed. Rep., 257, is considered in the petition (p.).

Supreme Court of the United States.

No. 491.—October Term, 1901.

The City of New York and Bird S. Coler, as Comptroller thereof, Petitioners, vs. Samuel Pine and Frederick Müller.	On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 7, 1902.]

This was a suit commenced in the Circuit Court of the United States for the Southern District of New York by the appellees, as plaintiffs, for an injunction, restraining the city of New York from maintaining a dam on the West Branch of Byram River and diverting the waters thereof from their natural flow through the farms of plaintiffs.

The facts are these: Byram River is a non-navigable stream of fresh water flowing into Long Island Sound. Tracing its source up stream from the Sound, for a short distance it forms the boundary between New York and Connecticut, then deflects to the east, and for some five or six miles is within the State of Connecticut. It there divides into two branches, the east branch being entirely within the limits of that State. The west branch, which is the longer of the two, extends into the State of New York. A few hundred feet from the State line the city of New York, under legislative sanction, commenced the construction of a dam, with a view of appropriating part or all of the waters of this west branch and using the same for the supply of the city. The watershed of this west branch above the dam, the territory from which the water sought to be appropriated is all drawn, is wholly within the limits of the State of New York. The plaintiffs own farms situated on Byram River in Connecticut, below the junction of the two branches. In their bill they alleged, among other things:

"Fourth. Your orators further aver that the defendant began about two years ago the building of a dam across the said West Branch of said Byram River, about five hundred feet north of the Connecticut line, and is now building said dam and it is now near completion, and your orators are informed and believe that the said defendant intends to divert or cause to be diverted the water of said West Branch or some of it from the natural channel thereof, and intends to divert or cause the same to be diverted from flowing through its natural channel into and through the State of Connecticut, and by, through and over land owned by your orators.

"Fifth. Your orators further aver that they as riparian owners of land in the State of Connecticut, on said Byram River or on the West Branch

thereof, are each of them accustomed to use the water of said river, . . . and that the flow of said river would be materially lessened by the diversion of the water of the said West Branch or any part thereof, and that they, your orators, and each of them, would be damaged in the sum of twenty-four hundred dollars ($2,400) and more."

The answer of the city admitted the building of the dam, although averring that it was not near completion, and would not prevent the natural flow of the West Branch for at least a year; admitted its intention to appropriate some or all of the water; alleged that such appropriation would cause little or no injury or damage to the plaintiffs, and denied on information and belief that the premises of either would be damaged in the sum of twenty-four hundred dollars; averred that the building of the dam was of great and permanent benefit to the citizens and residents of New York, and that it was and always had been able and and willing to pay any damages that the complainants might suffer from being deprived of the natural flow of the water. Testimony was taken and the case submitted to the court upon pleadings and proofs. That the dam as completed, and it was completed when the testimony was taken, would work a diversion of a considerable portion of the water in its natural flow, and that the property of plaintiffs was damaged by such diversion, was shown by the testimony and found by the court, although whether such damage amounted to more than twenty-four hundred dollars each was perhaps not established by the testimony, and certainly was not found by the court. The cost of the dam proper was about $45,000, though the city had expended for land and damages several hundred thousand dollars. It also appeared that several thousand people in the city of New York were dependent upon this water supply. The Circuit Court, after finding the fact of damage, held that a court of equity had no power to ascertain and order the payment of damages, but that it might delay the issue of an injunction so as to give the parties an opportunity to agree in respect to the amount of compensation, and in an opinion, filed on June 27, 1900, ruled that a decree would be entered on November 1, 1900, if the parties had not come to an agreement. Thereafter, no agreement having been made, a decree was entered as follows:

"That the complainants in this suit and each of them are entitled to the injunction order of this court restraining the defendant, its successors and assigns, their and its officers, agents and employees, each, all and any of them, from diverting the water or any part of the water of the West Branch of the Byram River or any part of the water of the Byram River, or in preventing in any way said water or any part thereof at any time from flowing through its natural channel, before, at and below the junction of the two branches of said river; and

"It is further ordered, adjudged and decreed that the defendant, its successors and assigns, their and its officers, agents and employees, each, any and all of them, be and they and each of them are hereby perpetually

enjoined from diverting the water or any part of the water of the West Branch of the Byram River, or any part of the water of the Byram River, or in preventing in any way said water or any part thereof at any time from flowing through its natural channel, before, at and below the junction of the two branches of said river."

On appeal to the Circuit Court of Appeals for the Second Circuit this decree was, on October 30, 1901, affirmed by a divided court. Thereupon the case was brought here by certiorari. (183 U. S. 700.)

Mr. Justice BREWER delivered the opinion of the Court.

Many interesting questions are involved in this case, but we think it unnecessary for the present at least to decide more than one. We assume, without deciding, that, as found by the Circuit Court, the plaintiffs will suffer substantial damage by the proposed diversion of the water of the West Branch. Also, without deciding, we assume that, although the West Branch above the dam and all the sources of supply of water to that branch are within the limits of the State of New York, it has no power to appropriate such water or prevent its natural flow through its accustomed channel into the State of Connecticut; that the plaintiffs have a legal right to the natural flow of the water through their farms in the State of Connecticut and cannot be deprived of that right by and for the benefit of the city of New York by any legal proceedings either in Connecticut or New York; and that a court of equity, at the instance of the plaintiffs, at the inception and before any action had been taken by the city of New York, would have restrained all interference with such natural flow of the water.

Notwithstanding these assumptions we are of opinion that the decree ought not to stand, and for these reasons: This is not a case between two individuals in which is involved simply the pecuniary interests of the respective parties. On the one side are two individuals claiming that their property rights are infringed—rights which can be measured in money, and that not a large sum; on the other, a municipality undertaking a large work with a view of supplying many of its citizens with one of the necessities of life. According to the averments in the bill the city had been engaged in this work for two years and had nearly completed the dam. While the near completion is denied in the answer there is no denial of the time during which the city had been engaged in the work, and it stands as an admitted fact that for two years prior to the commencement of this suit the work had been under way. It is true the testimony discloses that the plaintiffs and the city had been trying to agree upon the amount of compensation, but that shows that the plaintiffs were seeking compensation for the injuries they would sustain, and were not insisting upon their alleged right to an abandonment of the work. It is one

thing to state a right and proffer a waiver thereof for compensation and an entirely different thing to state the same right and demand that it should be respected. In the latter case the defendant acts at his peril. In the former he may well assume that payment of a just compensation will be accepted in lieu of the right. In the latter the plaintiff holds out the single question of the validity and extent of the right; in the former he presents the right as the foundation of a claim for compensation, and his threat to enforce the right if compensation is not made is simply a club to compel payment of the sum he deems the measure of his damages. Further, the testimony shows that the city was settling with other parties similarly situated, and paying out large sums of money for the damages such parties would sustain. So, it is not strange that the city acted on the assumption that the only matter to be determined was the amount of the compensation.

If the plaintiffs had intended to insist upon the strict legal rights (which for the purposes of this case we assume they possessed), they should have commenced at once, and before the city had gone to expense, to restrain any work by it. It would be inequitable to permit them to carry on negotiations with a view to compensenation until the city had gone to such great expense, and then, failing to agree upon the compensation, fall back upon the alleged absolute right to prevent the work. If they had intended to rest upon such right and had commenced proceedings at once, the city might have concluded to abandon the proposed undertaking and seek its water supplies in some other direction. If this injunction is permitted to stand the city must pay whatever the plaintiffs see fit to demand, however extortionate that demand may be, or else abandon the work and lose the money it has expended. While we do not mean to intimate that the plaintiffs would make an extortionate demand, we do hold that equity will not place them in a position where they can enforce one.

The time at which parties invoke the aid of a court of equity is often a significant factor in determining the extent of their rights. *Vigilantibus non dormientibus æquitas subvenit* is a maxim of equity. As said by Pomeroy, in his work on Equity Jurisprudence, vol. 1, sec. 418, the principle embodied in this maxim "operates throughout the entire remedial portion of equity jurisprudence, but rather as furnishing a most important rule controlling and restraining the courts in the administration of all kinds of relief, than as being the source of any particular and distinctive doctrines of the jurisprudence. . . . The principle thus used as a practical rule controlling and restricting the award of reliefs is designed to promote diligencé on the part of suitors."

In *Smith* v. *Clay*, (3 Brown Ch. 639, note,) Lord Camden said: "A court of equity, which is never active in relief against conscience or public con-

venience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and *reasonable diligence.*"

It was said by Circuit Judge Shipman, in deciding this case:

"If a court of equity has power in any case by decree to ascertain and order the payment of damages by decree of injunction in the alternative, a court of equity will not exercise such power where the defendant has committed a permanent injury without authority of law and without pretense of right to take and retain the property."

However true that proposition may be generally when invoked at the inception and before any work has been done, we think it not applicable when the plaintiffs have waited until the work has been progressing for two years and the defendant has expended a large sum of money thereon. As declared by Lord Camden, in the quotation just made, a court of equity is never active in relief against public convenience.

It may be not amiss to notice some of the cases in which the effect of time upon a suit in equity has been the subject of discussion. In *Galliher* v. *Cadwell*, (145 U. S. 368,) was considered the general subject of laches. Many authorities were cited and reviewed, and it was said (p. 373):

"Bnt it is unnecessaay to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

In *Roberts* v. *Northern Pacific Railroad*, (158 U.S. 1,) it appeared that Douglas County, Wisconsin, had agreed with the Northern Pacific Railroad Company to deed to it certain lands, held by the county under tax titles, in consideration of the construction by the company of its railroad through the county. The company constructed the road and the county made the deed. Thereafter the validity of such deed was questioned, and the county made a conveyance of the lands to Roberts *et al.*, whereupon the railroad company brought suit against them to quiet its title. The line of the road was constructed through some of these lands, and Mr. Justice Shiras, speaking for the court, observed, (pp. 9, 10, 11):

"So far as those portions of the lands, described in the bill of complaint, consist of parcels held and used by the railway company for the necessary and useful purposes of their road as a public highway, it is obvious that the title and possession thereof cannot be successfully assailed by the appellants. The latter became purchasers long after the railroad company had entered into visible and notorious possession of these portions of the lands and had constructed the roads, wharves and other improvements called for by their contract with the county.

"It is well settled that where a railroad company, having the power of eminent domain, has entered into actual possession of land necessary for

its corporate purposes, whether with or without the consent of the owner of such lands, a subsequent vendee of the latter takes the land subject to the burthen of the railroad, and the right to payment from the railroad company, if it entered by virtue of an agreement to pay, or to damages, if the entry was unauthorized, belongs to the owner at the time the railroad company took possession. . . . So, too, it has been frequently held that if a landowner, knowing that a railroad company has entered upon his land, and is engaged in constructing its road without having complied with the statute requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and be restricted to a suit for damages. (*Lexington & Ohio Railroad* v. *Ormsby*, 7 Dana, 276; *Harlow* v. *Marquette &c. Railroad*, 41 Mich. 336; *Cairo & Fulton Railroad* v. *Turner*, 31 Ark. 494; *Pettibone* v. *La Crosse & Milwaukee Railroad*, 14 Wis. 443; *Chicago & Alton Railroad* v. *Goodwin*, 111 Ill. 273.)"

Again, *Penn Mutual Life Insurance Co.* v. *Austin*, (168 U. S. 685,) was a suit to perpetually restrain the city of Austin from completing a system of waterworks, and from levying on the property of the Austin Water, Light and Power Company any taxes to pay therefor, and it was held that by reason of the delay in pressing their claim, the plaintiffs were not entitled to the relief, and many authorities were cited in the opinion in support thereof.

In *Northern Pacific Railroad Co.* v. *Smith*, (171 U. S. 260,) was presented a question similar to that in *Roberts* v. *Northern Pacific Railroad*, *supra*, and the same conclusion was reached. In the course of the opinion *Provolt* v. *Chicago, Rock Island & Pacific Railroad*, (57 Mo. 256, 264,) was cited. That was a case in which the conduct of a landowner in standing by while a railroad company constructed its road precluded him from recovering physical possession of the land covered thereby, and this quotation was made from the opinion of that court:

"If, from negotiation in regard to the price of the land, or for any other reason, there is just ground of inference that the works have been constructed with the express or implied assent of the landowner, it would seem wholly at variance with the expectations of the parties and the reason of the case, that the landowner should retain the right to enter upon the land, or to maintain ejectment. There are other effective and sufficient remedies. A court of equity would unquestionably interfere, if necessary, and place the road in the hands of a receiver until the damages were paid from the earnings. (2 Redf. Am. Railw. Cas. 2d. ed. 353.) But the only question we are called upon to decide is whether under all the facts and circumstances of this case ejectment will lie, and we think it will not."

This question was also considered in *Charleston Railway Co.* v. *Hughes*, (105 Ga. 1,) and in the course of the opinion on page 15 are these pertinent observations by Mr. Justice Cobb:

"When a railroad company, without warrant or authority, enters upon the land of another, it is as a general rule no less a trespasser than any other person who is guilty of an act of a similar nature. If, however, a railroad company enters upon the land with the consent of the owner, or under license from him, and the property thus taken possession of becomes such a necessary component part of its railroad that to surrender its possession would interfere seriously with the interests of the company, the landowner, although entitled to compensation for his property, might by his conduct in allowing the entry upon his land and permitting the company to so use it as that it could not be abandoned without great prejudice to its rights, estop himself from asserting against the company the legal title to the property by an action of ejectment. The propositions above stated are simply the application of familiar principles of law which govern in all transactions of the character above referred to, whether the controversy be between natural persons alone, or between such persons and corporations, and whether the corporation be public or private. A railroad corporation, being one charged by the law with the performance of certain duties to the public, is allowed, under some circumstances, to set up rights connected with the land over which it operates its line or railway, of which an individual or an ordinary private corporation would not generally be allowed to avail itself. Controversies in reference to possession of land, where the rights of individuals only are involved, are purely matters of private concern. Controversies in which a corporation charged with the duties incumbent upon carriers of passengers, freight and mails, in which an effort is made by private individuals or others to take away from such corporation a part of the property in its possession, which is absolutely essential to its complete performance of the public duties required of it, become matters of more than private concern, and in which the public is deeply and seriously interested. For this reason it has become settled law that the harsh remedies which would be allowed to one individual against another in reference to the possession of land will not be allowed to one who is seeking to recover such property from a railroad company, when exact justice can be done to such owner by giving him remedies which are less severe in their nature, and by which he would secure substantially the same rights, thereby saving to the public the right to require a performance of the public duties incumbent upon the corporation whose property is the subject matter of the controversy. That a railroad corporation has a right to deprive a person of his property for its uses by doing acts which in an individual would be dealt with as a trespass is not contended for; but when a railroad company enters upon land and constructs its road without lawful authority, and the landowner acquiesces in the wrongful act and the consequent appropriation of the property to a great public use until the same has become a necessary component part of the property required by the railroad to perform its public duties, such landowner will be held to have waived his right to retake the property, and will be remitted to such other remedies for the wrong done him as will not interfere with the rights of the public to have the railroad maintained and operated."

See also *Atlanta, Knoxville & Northern Railway Company* v. *Barker*, (Id. 534;) *Chicago, Burlington & Quincy Railroad Company* v. *Englehart*, (57 Neb. 444.)

From these authorities it is apparent that the time at which a party appeals to a court of equity for relief affects largely the character of the relief which will be granted. If one, aware of the situation, believes he has certain legal rights, and desires to insist upon them, he should do so promptly. If by his declarations or conduct he leads the other party to believe that he does not propose to rest upon such rights but is willing to waive them for a just compensation, and the other party proceeds to great expense in the expectation that payment of a fair compensation will be accepted and the right waived—especially if it is in respect to a matter which will largely affect the public convenience and welfare—a court of equity may properly refuse to enforce those rights, and, in the absence of an agreement for compensation, compel him to submit the determination of the amount thereof to an impartial tribunal.

These views do not justify the conclusion that a court of equity assumes a general right to ignore or supersede statutory provisions for the ascertainment of the amount of compensation in cases of condemnation. They simply mean that a failure to pursue statutory remedies is not always fatal to the rights of a party in possession, and that sometimes if full and adequate compensation is made to the plaintiff the possession of the defendant will not be disturbed.

It is true the cases cited were mainly those of actual physical possession by railroad companies of real estate belonging to other parties, but the same doctrine applies when there is only an invasion of some easement or other incorporeal right, and its preservation can alone be secured in a court of equity. The action of the court does not depend upon the character of the property or right involved but upon the conduct of the plaintiff in respect to his claim. *Pappenheim* v. *Metropolitan Elevated R. R. Co. et al.*, (128 N. Y. 436,) was a suit brought by the owner of premises on Second avenue, in New York city, to restrain the defendants from operating their elevated railway in front of plaintiff's premises. The trial court found the amount of the damage to the premises, and provided by its decree that an injunction should not issue in case the defendants paid the amount of the damage upon the execution by plaintiff of a deed conveying her interest in the easement taken. This decree was affirmed by the Court of Appeals, and in the opinion by Mr. Justice Peckham, then a member of that court, it was said, after referring to the rule controlling actions at law:

"But the owner may resort to equity for the purpose of enjoining the continuance of the trespass, and to thus prevent a multiplicity of actions at law to recover damages; and in such an action the court may determine the amount of damage which the owner would sustain if the trespass were permanently continued, and it may provide that, upon payment of that sum, the plaintiff shall give a deed or convey the right to the defendant, and it will refuse an injunction when the defendant is willing to pay upon

the receipt of a conveyance. The court does not adjudge that the defendant shall pay such sum and that the plaintiff shall so convey. It provides that, if the conveyance is made and the money paid, no injunction shall issue. If defendant refuses to pay, the injunction issues." (p. 444.)

It is true in that case the plaintiff sought in her petition the very relief that was granted, and so the case is not authority on the question of the effect of delay in asserting one's legal rights, but it is authority for the proposition that a court of equity may take full possession and finally end the controversy by securing the payment of adequate compensation in lieu of a cessation of the trespass. See, also, *Jackson* v. *Stevenson*, (156 Mass. 496, 502.)

It is, however, urged that in all the cases referred to the one party could have appropriated the property or right of the other by condemnation proceedings, and that as he could have done so he should not be disturbed for lack of those proceedings, but either given time to carry them through, or else in the pending equitable suit have the compensation or damages estimated and then, upon payment, be protected in his possession. In other words, as he could have obtained the rightful possession by legal proceedings and payment, equity will do what the law could have done, and on payment of the ascertained compensation or damages affirm the possession. Whatever may be true of those cases, we start in this with the assumption that there was no power in the city of New York, by any proceedings in the States of New York or Connecticut, to acquire the right of appropriating this water and thus depriving the plaintiffs of its continued flow. It was suggested in the *Pappenheim case, supra*, that "in cases where the owner wishes to actually stop the further trespass, and where the defendant has no legal right to acquire the property, such condition would not be inserted, and an injunction would issue upon the right of the owner being determined. (*Henderson* v. *Central Railroad Co.*, 78 N. Y. 423.)"

But the ruling of this court has been to the contrary, at least in cases where there has been delay on the part of the plaintiff in commencing suit. In *Osborne* v. *Missouri Pacific Railway Company*, (147 U. S. 248,) the plaintiff, owning lots on Gratiot street, in St. Louis, filed a bill in the United States Circuit Court for the Eastern District of Missouri, to restrain the defendants from constructing a steam railroad along such street. The fee of the street was in the public, but it was alleged that the construction and operation of the railroad would work a damage to the property of the plaintiff's, and the facts tending to show such damage were set forth. It appeared that the road had been constructed before the bill was filed. Section 21 of article 2 of the Missouri Constitution of 1875 reads "that private property shall not be taken, or damaged, for public use without just compensation." The statutes of Missouri provided means for condemning a right of way and assessing the value of property taken, but

contained no provision for assessing the damages to property not taken, so that neither the railroad company nor the plaintiff could at the time have taken any legal proceedings for ascertaining the amount of the damage to plaintiff's property by the construction of the railroad. The Circuit Court, finding that the plaintiff's property was damaged, and assuming that the damages came within the protecting clause of the constitution, held that nevertheless the plaintiff was not entitled to an injunction, saying (35 Fed. Rep. 84, 85):

"The question at issue is whether a complainant, who claims damages resulting incidentally to his property from the laying of a railroad track in a public street under a legislative and municipal license, can wait until the work is done, and then enjoin its operation, although none of his property is actually taken, or whether he should in such case be left to his remedy at law for the damage inflicted? Unless the wrongdoer is insolvent, or unless some other cause exists to render the legal remedy of no avail, it appears to me that on general principles he should be left to his legal remedy, and it was so held in the cases first above cited. The rule does not deprive the complainant of the protection intended to be afforded by the constitution, nor does it work any hardship. It simply requires the complainant to be diligent in applying for such relief as equity may afford."

That decision was affirmed by this court, and in the opinion it was said (p. 259):

"But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the inflicting of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial and the remedy at law in fact inadequate before restraint will be laid upon the progress of a public work."

Reference was made in the opinion to *McElroy* v. *Kansas City*, (21 Fed. Rep. 257,) a case in the Circuit Court of the United States for the Western District of Missouri, in which the same constitutional provision was in question, and an application made to restrain the grading of a street in front of the complainant's lot, and in which, as stated, "it was ruled that, if the injury which the complainant would sustain from the act sought to be enjoined could be fully and easily compensated at law, while, on the other hand, the defendant would suffer great damage, and especially if the public would suffer large inconvenience if the contemplated act were restrained, the injunction should be refused, and the complainant be remitted to his action for damages. If the defendant had an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition was within the power of the defendant, the injunction would almost universally be granted until the condition was complied with; but if the means of complying with the condition were not at defendant's command, then the court would adjust its order so as to give complainant the substantial benefit of the condition while not restraining defendant from the exercise of its ultimate rights."

These propositions do not, as counsel for appellees suggest, necessitate some legislation like the act of Parliament known as Lord Cairn's act, 21 and 22 Victoria, chap. 27, by which it was provided that "in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement or against the commission or continuance of any wrongful act or for the specific performance of any covenant, contract or agreement it shall be lawful for the same court, if it shall think fit, to award damages to the party injured either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct."

Nor do they justify the conclusion that under their application one man is at liberty to wrong another upon payment of damages. There is no thought of creating a new rule or of substituting a judicial opinion for an act of Congress. All that can be fairly said in reference to them is that they are an application of the ancient maxim that he who seeks equity must do equity. Limiting them, as we have limited them in the present case, to conditions which exist after defendant has proceeded in the completion of its proposed work and has expended a large sum of money therein, they can never be considered as inviting a party to do a wrong with the expectation of escaping every penalty save a pecuniary one.

On that ground alone, and without deciding whether plaintiffs have a legal right to recover damages, the decrees of the Circuit Court of Appeals and the Circuit Court will be reversed and the case remanded to the latter court, with instructions to set aside its decree and to enter one providing for an ascertainment, in the way courts of equity are accustomed to proceed, of the damages, if any, which the plaintiffs will suffer by the construction of the dam and the appropriation of the water, and for which the defendant is legally responsible, a proposition upon which we express no opinion, and fixing a time within which the defendant will be required to pay such sum, and that upon the failure to make such payment an injunction will issue as prayed for; and, on the other hand, that upon payment a decree will be entered in favor of the defendant. If the plaintiffs shall prefer to have their damages assessed by a jury, leave may be given to dismiss the bill without prejudice to an action at law.

Mr. Justice GRAY did not hear the argument and took no part in the decision of this case.

Mr. Justice White took no part in the decision of this case.

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